(18)

No. 90-757-CFX
Status: GRANTED

Title: Ronald Chisom, et al., Petitioners
v.
Charles E. Roemer, et al.

Docketed:
November 14, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
90-1032

Counsel for petitioner: Ralston,Charles Stephen

Counsel for respondent: Solicitor General, Pugh,Robert G.

See also:
90-813

Recd. 15 copies of a lodging on 11/14/90.

Entry	Date	Note	Proceedings and Orders
1	Nov 14 1990	G	Petition for writ of certiorari filed.
2	Nov 14 1990		Lodging received, 15 copies.
3	Dec 13 1990		Brief of respondents Charles Roemer, et al. in opposition filed.
4	Dec 28 1990	N	Motion of petitioners to expedite consideration of the petition filed.
5	Dec 28 1990		DISTRIBUTED. January 4, 1991.
7	Jan 7 1991		REDISTRIBUTED. January 11, 1991
9	Jan 14 1991		REDISTRIBUTED. January 18, 1991
10	Jan 18 1991		The motion of petitioners in No. 90-757 to expedite consideration of the petition for a writ of certiorari in No. 90-757 is granted. The petition for a writ of certiorari is granted. The case is consolidated with 90-1032, and a total of one hour is allotted for oral argument.
			**********
11	Feb 1 1991		Record filed.
		*	Certified copy of C. A. Proceedings recieved.
12	Feb 8 1991		Record filed.
		*	Certified copy of original record received. (Box).
13	Feb 27 1991		SET FOR ARGUMENT MONDAY, APRIL 22, 1991. (1ST CASE)
14	Mar 1 1991		Brief amicus curiae of Supreme Court Justice for Orleans filed.
19	Mar 1 1991		Brief amicus curiae of Supreme Court Justice for Orleans filed. VIDED.
21	Mar 1 1991		Brief amicus curiae of Darleen M. Jacobs filed.
15	Mar 4 1991		Brief of petitioners Ronald Chisom, et al. filed.
16	Mar 4 1991		Brief of petitioner United States filed. VIDED.
17	Mar 4 1991		Joint appendix filed. VIDED.
18	Mar 4 1991		Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. VIDED.
20	Mar 4 1991		Brief amicus curiae of American Judicature Society filed. VIDED.
22	Mar 18 1991	G	Motion of the Solicitor General for divided argument filed.
23	Mar 22 1991		CIRCULATED.
24	Mar 25 1991		Motion of the Solicitor General for divided argument GRANTED.
25	Apr 1 1991	X	Brief amicus curiae of Pacific Legal Foundation filed.
26	Apr 2 1991	X	Brief amicus curiae of Georgia filed. VIDED.

2 P

No. 90-757-CFX

Entry	Date	Note	Proceedings and Orders
27	Apr 5 1991	X	Brief of respondents Roemer, et al. filed. VIDED.
28	Apr 5 1991	X	Brief amici curiae of Wasnington Legal Foundation, et al. filed. VIDED.
29	Apr 15 1991	X	Reply brief of petitioners Ronald Chisom, et al. filed. VIDED.
31	Apr 22 1991		ARGUED.

(1)

90-757

No.

Supreme Court, U.S.
FILED
NOV 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Should this Court grant certiorari to resolve a conflict between the circuits as to whether Section 2 of the Voting Rights Act, as amended, governs the election of judicial officers?

PARTIES

The following were parties in the courts below:

Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon III, and the Louisiana Voter Registration/Education Crusade, *Plaintiffs*;

The United States of America, *Plaintiff-Intervenor*;

Charles E. Roemer, in his capacity as governor of the State of Louisiana, W. Fox McKeithen, in his capacity as Secretary of the State of Louisiana, and Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana, *Defendants*.

Pascal F. Calogero, Jr., and Walter F. Marcus, Jr., *Defendants-Intervenors*.

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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon III, and the Louisiana Registration/Education Crusade respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on November 2, 1990.

OPINIONS BELOW

The opinion of the Fifth Circuit is not yet reported, and is set out at pp. 1a-3a of the appendix hereto ("App."). The opinion of the United States District Court for the Eastern District of Louisiana is unreported and is set out at pp. 4a-64a of the appendix, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court.

In addition to the opinions in this case, there is set out at pp. 65a-99a of the appendix hereto the opinion of the majority of the Fifth Circuit sitting *in banc* in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990), which is the basis of the opinion of the Fifth Circuit in this case.

This case was the basis of two earlier appeals; the previous reported decisions, in chronological order, are as follows:

Chisom v. Edwards, 659 F. Supp. 183 (E.D. La. 1987);

Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. __, 102 L.Ed.2d 379 (1988);

Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988);

Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988).

JURISDICTION

The decision of the Fifth Circuit was entered on November 2, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, which provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by a State of political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .

(b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The Proceedings Below.

This case was brought by African American citizens of the United States in 1986 under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973 and the fourteenth and fifteenth amendments to the Constitution of the United States.[1] The plaintiffs, who are voters, attorneys,

[1]The issue in the case as it reaches this Court involves only the claims of the petitioners under the Voting Rights Act.

and a voter registration and education organization, challenged the multi-member aspect of the scheme of election of justices of the Supreme Court of Louisiana by districts on the ground it denied African Americans an equal opportunity to participate in the political process.

The district court initially granted the defendants' motion to dismiss on the ground that Section 2 of the Voting Rights Act did not govern the election of judges; this ruling was reversed by the Fifth Circuit and this Court denied certiorari. *Chisom v. Edwards*, 659 F. Supp 183 (E.D. La. 1987), *reversed*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. __, 102 L.Ed.2d 379 (1988).[2]

After a trial on the merits, the district court held that the plaintiffs had not established that the method of electing supreme court justices violated either the Voting Rights Act

[2]On remand, the district court granted a preliminary injunction enjoining the state from going forward with an election under the challenged system, *Chisom v. Edwards*, 690 F.Supp 1524 (E.D. La. 1988), but this decision was also reversed, by a different panel of the Fifth Circuit. *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988).

or the Constitution. (App. pp. 4a-64a.) Petitioners appealed limited to the question of whether a violation of the Voting Rights Act had been shown. On November 2, 1990, a panel of the Fifth Circuit ruled that the Voting Rights Act does not apply to judicial elections based on the September 29, 1990, *in banc* Fifth Circuit in *LULAC v. Clements*, 914 F.2d 620 (App. pp. 65a-99a).[3]. The "cardinal reason" for the result in *LULAC* was that the Voting Rights Act did not apply to judicial elections because "judges need not be elected at all." 914 F.2d at 622. App. p. 66a.[4] Judges Higginbotham and Johnson, who were on the panel in the

[3]In *LULAC*, after oral argument before a panel of the Fifth Circuit, the full court, *sua sponte*, set down the case for rehearing *in banc* to decide the issue of whether the Voting Rights Act applies to judicial elections. By a 7-6 majority the Fifth Circuit overruled its prior decision in *Chisom* and held that the results test of Section 2, did not apply to the election of judges. *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990)(App. pp. 65a-99a)

[4]A petition for writ of certiorari will be filed in *LULAC v. Clements* shortly. For the reasons set out in that petition, petitioners here urge that review be granted in both cases.

present case, dissented from that holding of *LULAC*[5] but were constrained to rule in *Chisom* that judicial elections were not covered at all by Section 2 of the Voting Rights Act and that, therefore, the complaint must be dismissed.[6] (App. pp. 2a-3a.) This petition followed.

Statement of Facts.

In Louisiana, all but one of the six districts from which members of the Supreme Court are elected are geographically defined single member districts and elect one justice each. The lone multimember district, the First Supreme Court District ("the First District") elects two

[5]Judge Higginbotham, joined by three other judges, dissented from the holding that Section 2 covered *no* judicial elections, but concurred in the result in *LULAC* on other grounds. 914 F.2d at 636. Judge Johnson, who was the author of the original opinion in the present case, dissented in *LULAC*. 914 F.2d at 657. Chief Judge Clark also concurred in the result in *LULAC* but not with its holding that no judicial elections were covered. 914 F.2d at 633.

[6]As a result of the decision in *LULAC*, the panel in the present case did not reach or decide the issue of the correctness of the decision of the district court on the merits of plaintiffs' claims. If this Court grants certiorari and reverses the decision below, the appropriate disposition would be a remand to the court of appeals for a decision on the merits.

justices.[7] App. 7a-8a. With a population of over 1,100,000 and spanning four parishes -- Orleans, St. Bernard, Plaquemines, and Jefferson -- it is by far the largest supreme court district, is more than twice the size of the smallest supreme court district,[8] and has by far the largest African American population. The First District is 34.4% African American in total population and African Americans comprise 31.61% of the registered voters. App. 10a. Orleans Parish contains more than half of the population of the First District and is majority African American in both total population (55.3%) and in the percentage of registered voters (51.6%). As of March 3, 1988, 81.2% of African American registered voters within the First District resided within Orleans Parish. The other three parishes that make

[7]The two justices have staggered terms, so that they are chosen in different elections. Therefore, African American voters are unable to optimize their political influence by single-shot voting.

[8]The Louisiana constitution does not require that the election districts for the Supreme court be apportioned equally by population. Indeed, the total population deviation between districts is 74.95%, with the 1980 population of the Fourth District being 411,000. App. 10a.

up the First District are overwhelmingly white. App. 9a, 13a.

The result of combining the four parishes into one district from which the entire population elects two supreme court justices is that white voters are in a substantial majority, comprising 65.21% of the total population and 69.49% of the voting age population. App. 10a. The First District could easily be split into two roughly equal supreme court districts: one, comprised of Orleans Parish, predominantly African American with a population of 557,515, and the other, comprised of the three remaining parishes, predominantly white with a population of 544,738.[9] App. 10a.

Judicial elections in Louisiana are extremely racially polarized. Whites vote for white candidates and when given a choice, African Americans overwhelmingly support

[9]These two districts would fall well within the range of population of existing supreme court districts; for example, the Second and Sixth Districts have populations of 582,223 and 556,383, respectively. App. 10a.

African American candidates. White voters consistently fail to support African American judicial candidates. This political climate exists against an historical backdrop of pervasive disenfranchisement on the basis of race.[10] In addition, the African American community continues to suffer a legacy of discrimination that translates into depressed socio-economic conditions today.

No African American has been elected to the Louisiana Supreme Court from the First District or any other supreme court district in modern times.[11] Although African Americans comprise 29% of the state's population, few African Americans have been elected to other offices within the First District outside of Orleans Parish. The

[10]*United States v. Classic*, 313 U.S. 299 (1941); *Louisiana v. United States*, 380 U.S. 145 (1965); *Anderson v. Martin*, 375 U.S. 399 (1964). *See also*, *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) for a vivid account of discriminatory practices in Plaquemines Parish.

[11]The only African American to serve on the Louisiana Supreme Court in this century was appointed to a vacancy on the court for a period of 17 days during November, 1979. Under the Louisiana Constitution, he was not permitted to seek election to the seat for which he had been appointed. *See* La. Const. art. V, § 22(b).

combination of demographic, historical, and socio-economic factors results in African American voters in the First District being denied equal opportunity to participate in the political processes leading to the nomination and election of justices to the supreme court and therefore to elect candidates of their choice.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT ISSUE OF THE MEANING OF THE VOTING RIGHTS ACT ON WHICH THERE IS A CONFLICT BETWEEN THE CIRCUITS

A. The Question of Whether Section 2 Governs Judicial Elections is of National Importance.

Cases challenging the election of judges under Section 2 of the Voting Rights Act have been brought in Ohio,[12] Louisiana,[13] Texas,[14] Florida,[15] Alabama,[16] Georgia,[17]

[12]*Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988)(challenge to the countywide election of municipal judges in Cincinatti).

[13]*Chisom v. Roemer*, *supra*; *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988)(challenge to at-large election of family court, district court, and court of appeals judges).

[14]*LULAC v. Mattox*, *supra*; *Rangel v. Mattox* (5th Cir. No. 89-6226)(challenge to the multi-county election of judges for the Thirteenth Court of Appeals).

[15]*Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla. 1990)(challenge to the at-large election of trial judges in the Fourth Judicial Circuit).

[16]*SCLC v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989)(challenge to the numbered post, at-large method of electing circuit and district court judges).

[17]*Brooks v. State Board of Elections*, Civ. No. 288-146 (S.D. Ga. 1989)(challenge to at-large method of electing superior court judges under both Sections 2 and 5 of the Act; summary affirmance by this Court on Section 5 issues, 59 U.S.L. Week 3293 (October 15, 1990), trial pending on Section 2 claims).

Arkansas,[18] Illinois,[19] Mississippi,[20] and North Carolina.[21] Before the Fifth Circuit's decisions in this case and *LULAC*, in all of these cases courts had held that Section 2 governed the elections of both trial and appellate court judges. However, the effect of the decisions in *Chisom* and *LULAC* have already been felt outside of the Fifth Circuit; thus in *SCLC v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989), the district judge recently ordered the parties to file briefs on the defendants' motion for reconsideration in light of *LULAC*.

[18]*Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark. 1989)(challenge to the method of electing circuit, chancery, and juvenile court judges in certain counties).

[19]*Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988)(challenge to the at-large method of electing Supreme Court, Appellate, and Circuit Court judges from Cook County).

[20]*Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987)(challenge to the at-large election of judges to state chancery and circuit judges in three counties; district court found liability under Section 2, single-member district remedy established resulting in the election of African American judges).

[21]*Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C.)(challenge to the statewide election of state superior court judges; under settlement, ten African American candidates elected as superior court judges).

The opportunity for confusion caused by the decisions below, and the consequent prejudice to voters' and candidates' rights in jurisdictions where judicial election cases are pending, would in itself warrant this Court's review of this case. Review is made more all the more imperative in light of this Court's recent affirmance of the holding in *Brooks v. State Board of Elections* that Section 5 of the Act covers judicial elections. 59 U.S.L. Week 3293 (October 15, 1990). *Brooks* reiterated this Court's earlier affirmance of the holding in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) that Section 5 governs judicial elections since "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413 (emphasis in original).

As Judge Higginbotham noted in objecting to the *LULAC* majority's view that Section 2 does not apply to judicial elections (concurring opinion):

> To distinguish the Sections [2 and 5] would lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if a state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented.

914 F.2d at 649. Nevertheless, the *LULAC* majority, since it had to concede that Section 5 covered the election of judges (App. 93a), reached precisely this "incongruous result," one clearly at odds with this Court's directive that the Act be given its "broadest possible scope." *Allen v. State Board of Elections*, 393 U.S. U.S. 544 (1969). *Accord*, *Thornburg v. Gingles*, 478 U.S. 30 (1986).[22] Certiorari should be granted to resolve the confusion created by the Fifth Circuit's decision of the important issue presented by

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[22] Section 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting or any standards, practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class . . . .

478 U.S. at 43 (emphasis in the original).

this case, an issue on which this Court has not yet spoken.

B. The Decision of the Fifth Circuit Is in Square Conflict with the Decision of the Sixth Circuit in Mallory v. Eyrich.

In its first decision in the present case, *Chisom v. Edwards*, 839 F.2d 1056, *cert. denied*, 488 U.S. ___, 102 L.Ed.2d 379 (1988), holding that Section 2 covers judicial elections, the Fifth Circuit relied on substantially the same reasoning as did the Sixth Circuit in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). In overruling *Chisom* the Fifth Circuit has placed itself directly in conflict with *Mallory*. *Compare*, *e.g.*, the discussion of Sections 2 and 5 in *Mallory*, 839 F.2d at 280 and *Chisom*, 839 F.2d at 1063-64, *with* that in *LULAC*, App. 93a.

In *Mallory*, a challenge to the election of Ohio municipal court judges, the Sixth Circuit concluded that Section 2 applies to the election of judges based on a thorough review of the plain language of the statute and the

policy behind it,[23] relevant legislative history, and judicial interpretation of Section 5.[24] In its decision, the Sixth Circuit unequivocally rejected the reasoning now adopted by the Fifth Circuit in two critical respects.

First, the Sixth Circuit concluded that there is "no basis in the language or legislative history of the 1982 amendment to support a holding" that when it used the word "representative" in the 1982 amendment, Congress intentionally engrafted an exception onto Section 2 that removed judicial elections from the protective measures of

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[23]By its express terms, the original Voting Rights Act of 1965, which enacted a blanket prohibition against race-based discrimination in voting, applied to judicial elections. "Vote" or "voting" was defined in the Act as including "all actions necessary to make a vote effective in any primary, special or general election, . . . with respect to candidates for public or party office. . . ." §14(b)(42 U.S.C. § 1973*l*(c)(1)). Judicial candidates clearly were "candidates for public or party offices" within the terms of the Act. When Section 2 was amended in 1982, Congress did not change a single word in either Section 14(b) or the operative provisions of the statute that defined its scope. It merely *added*, in Section 2(b), a clear standard of proof for the violations outlined in the old Section 2, which now had become Section 2(a).

[24]As *Mallory* notes, "Section 5 uses language nearly identical to that of section 2 in defining prohibited practices -- 'any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.'" 839 F.2d at 280.

the Act. 839 F.2d at 280. *Compare LULAC*, App. 75a-91a. *Second*, the Sixth Circuit held that challenges to racially discriminatory election mechanisms under Section 2 are not controlled by the rule that the fourteenth amendment's equal population principle apparently does not apply to judicial election districts. 839 F.2d at 277-78 (citing *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973). *Compare LULAC*, App.80a-88a.

The conflict between the Fifth and Sixth Circuit's interpretation of the scope and meaning of Section 2 of the Voting Rights Act should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the decision of the court below reversed, and the case remanded for a decision on the merits of petitioners' claims under the Voting Rights Act.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3654

RONALD CHISOM, et al.,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

v.

CHARLES E. "BUDDY" ROEMER, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(November 2, 1990)

Before KING and HIGGINBOTHAM, Circuit Judges.*

PER CURIAM:

The plaintiffs in this action originally claimed that defendants violated the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting

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* This decision is being made by a quorum. see 28 U.S.C. § 46(d).

Rights Act of 1965, § 2, codified as amended, 42 U.S.C. § 1973 (Voting Rights Act). The district court ruled against the plaintiffs on the constitutional claims and the Voting Rights Act claims. The district court's ruling on the constitutional claims was not appealed. Thus, there remains pending before this court an appeal of the district court's disposition of the Voting Rights Act claims.

In view of the fact that this court, sitting en banc in Lulac v. Clements, 914 F.2d 620 (5th Cir. 1990), has overruled Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) (Chisom I), this case is remanded to the district court with instructions to dismiss all claims under the Voting Rights Act for failure to state a claim upon which relief may be granted. See Falcon v. General Telephone Co., 815 F.2d 317, 319-20 (5th Cir. 1987) ("[O]nce an appellate court has decided an issue in a particular case both the District Court and Court of Appeals should be bound by that decision in any subsequent proceeding in the same case.... unless..

controlling authority has since made a contrary decision of law applicable to the issue.") (citations omitted); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967). Each party shall bear its own costs.

REMANDED with instructions. The mandate shall issue forthwith.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD CHISOM, ET AL.	CIVIL ACTION
VERSUS	NO. 86-4057
CHARLES E. ROEMER, ET AL.	SECTION "A"

OPINION
[Filed September 13, 1989]

SCHWARTZ, J.

This matter came before the Court for nonjury trial. Having considered the evidence, the parties' memoranda and the applicable law, the Court rules as follows. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are so adopted.

Findings of Fact

This is a voting discrimination case. Plaintiffs have brought this suit on behalf of all black registered voters in Orleans Parish, approximately 135,000 people, alleging the

present system of electing the two Louisiana Supreme Court Justices from the New Orleans area improperly dilutes the voting strength of black Orleans Parish voters. Specifically, plaintiffs challenge the election of two Supreme Court Justices from a single district consisting of Orleans, Jefferson, St. Bernard and Plaquemines Parishes. Plaintiffs seek declaratory and injunctive relief under section 2 of the Voting Rights Act, as amended, 42 U.S.C. §1973 (West Supp. 1989)[1], and under the Civil Rights Act, 42 U.S.C.

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[1] Section 2 provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§1983 (West 1981)[2], for alleged violations of rights secured by the fourteenth[3] and fifteenth[4] amendments of the federal Constitution.[5]

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[2] Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

[3] The fourteenth amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[4] The fifteenth amendment provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

[5] Declaratory relief is also sought under 28 U.S.C. §§2201 and 2202, which provide in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights or other legal relation of any interested party seeking such declaration, whether or not further relief is or could be sought.

I.The present Supreme Court Districts and the black voting population; Minority or majority?

The Louisiana Supreme Court, the highest Court in the state, presently consists of seven Justices, elected from six Supreme Court Districts. Each Justice serves a term of ten years. Candidates for the Louisiana Supreme Court must have been a resident of that election district for at lease two (2) years, and each member of the Supreme Court must be a resident of the election district from which he or she was elected.[6] The State imposes a majority-vote requirement for election to the Supreme Court. Since 1976, every candidate runs in a single preferential primary, but each candidate's political party affiliation is indicated on the ballot. If no single candidate receives a majority of votes in the preferential primary, the top two candidates with the most votes in the primary compete in a general election. Five of the districts elect one Justice each, but one district -- the

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[6] See Pre-Trial Order Stipulation 19 at p.28.

First Supreme Court District -- elects two Justices.[7] These two positions are elected in staggered terms. No Justice is elected on a state-wide basis, although the Supreme Court sits en banc and its jurisdiction extends state-wide.[8] One of the seats in question is presently held by Justice Pascal F. Calogero, Jr.; the other is presently held by Justice Walter F. Marcus, Jr. Judges are not subject to recall elections.[9]

The five single member election districts consist of eleven to fifteen parishes; the First Supreme Court District, as stated above, consists of four parishes. No parish lines are cut by the election districts for the Supreme Court.[10] The Louisiana Constitution does not require that the election districts for the Supreme Court be apportioned equally by

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[7] See Pre-Trial Order Stipulation 18, 21 at pp.28-29.

[8] See Pre-Trial Order Stipulations 3-6, p.24. See also La. Const. of 1974, art. 5, §§ 3, 4 & 22A; LSA-RS § 13:101 (West 1983).

[9] See Pre-Trial Order Stipulation 23 at p.29.

[10] See id. nos. 9-10 at p.26.

population.[11] However, the Louisiana Constitution does authorize the state legislature, by a two-thirds vote of the elected members of each house of the legislature, to revise the districts used to elect the Supreme Court and to divide the first district into two single-member districts.[12]

The New Orleans metropolitan area is composed of Orleans Parish, which has a majority black electorate, and several suburban parishes which have majority white electorates. As of March 3, 1988, 81.2 percent of the black registered voters within the First Supreme Court District resided within Orleans Parish and 16.0 percent resided in Jefferson Parish. Only 2.1 percent of the black registered voters in the First District resided in Plaquemines and St. Bernard Parishes.

The following two tables set forth specific population data from the 1980 census:

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[11] See id. no. 12 at p.26.

[12] See id. no. 24 at p.29.

(1) For the six Supreme Court election districts:[13]

Dist-rict#	Total population	Black population(%)	Total VAP[14]	Black VAP(%)
1	1,102,253	379,101(34.39)	772,772	235,797(30.51)
2	582,223	188,490(32.37)	403,575	118,882(29.46)
3	692,974	150,036(21.65)	473,855	92,232(19.46)
4	410,850	134,534(32.75)	280,656	81,361(29.99)
5	861,217	256,523(29.79)	587,428	160,711(27.36)
6	556,383	129,557(23.29)	361,510	78,660(21.76)
TOT.	4,205,900			

(2) For the parishes in the First Supreme Court District:[15]

Parish	Total popula-tion	Black popula-tion	Total VAP	Black VAP(%)
Jefferson	454,592	63,001(13.86)	314,334	37,145(11.82)
Orleans	557,515	308,149(55.27)	397,183	193,886(48.81)
Plaque-mines	26,049	5,540(21.27)	16,903	3,258(19.27)
St. Bernard	64,097	2,411(3.76)	44,352	1,508(3.40)

As of March 3, 1989, registered voter data compiled by the

[13] See id. no. 13 at p.26.

[14] Voting Age Population

[15] See Pre-Trial Order Stipulation 15 at p.27.

Louisiana Commissioner of Elections indicated the following population characteristics:

(3) For the six Supreme Court election districts:

District #	Total registered voters	Black registered voters(%)
1	492,691	156,714 (31.8%)
2	285,469	76,391 (26.8%)
3	379,951	74,667 (19.7%)
4	208,568	59,140 (28.4%)
5	464,699	119,239 (25.7%)
6	305,699	70,178 (23.0%)

(4) For the parishes in the First Supreme Court District:[16]

Parish	Total registered voters	Black registered voters(%)
Jefferson	202,054	25,064 (12.4%)
Orleans	237,278	127,296 (53.6%)
Plaquemines	14,574	2,796 (19.2%)
St. Bernard	38,785	1,558 (4.0%)
TOTAL	492,691	156,714 (31.8%)

According to the 1980 Census, the current configuration

[16] See id. no. 16 at p.28.

of election districts has the following percent deviations[17] from the "ideal district"[18] with a population of 600,843:[19]

District #	Total Population	Percent Deviation
1	1,102,253	[-16.54%][20]
2	582,223	- 3.10%
3	692,974	+15.33%
4	410,850	-31.62%
5	861,217	+43.33%
6	556,383	- 7.40%

[17] The percentage deviations appear to have been calculated as follows:

$$\%\text{deviation} = \frac{\text{(actual district pop.- ideal district pop.)}}{\text{(ideal district population)}} \times 100$$

[18] In its review of the memoranda, testimony and exhibits, the Court was unable to locate any definition of the "ideal district" apart from reference to population. See Weber Report, Defendants' Exhibit 2, p.48. The Court therefore accepts the parties' stipulation as to the "ideal district" with the understanding that other factors of legal significance may suggest such a district is less than "ideal".

[19] The "ideal district" population of 600,843 is calculated by taking the total population of all districts (4,205,900) and dividing by seven, the number of ideal districts.

[20] The parties stipulated that District 1 shows a -8.27% deviation from the "ideal district." See Pre-Trial Order Stipulation 14, p.27. However, the definition of the ideal district is to take the state population and divide it by the number of districts. The First District elects two justices, therefore, in a comparison of the First District with the "ideal district," the First District's deviation should be multiplied by two, since it elects two justices in what would otherwise be an "ideal" seven district system.

The relative numbers and population densities of black persons registered to vote in each parish are also shown in the parties' stipulations that on December 31, 1988, black persons constituted a majority of those persons registered to vote in 226 out of an unspecified number of voting precincts in Orleans Parish,[21] whereas in Jefferson Parish black persons constituted a majority of those persons registered to vote in only 24 precincts. There are no census tracts in St. Bernard Parish with a majority black population and there is only one such census tract in Plaquemines Parish.[22]

With population size as the only stipulated indicia of an "ideal district", the Court further finds that a district consisting of just Orleans Parish would demonstrate an approximate -7.2% deviation from the ideal district, and a

[21] See United States' Exhibit 47. The March 3, 1989 voter registration data does not alter the number and/or identity of the majority black precincts. See United States' Exhibit 5.

[22] See United States' Exhibit 48. The March 3, 1989 voter registration data does not alter the number and/or identity of the majority black precincts. See United States' Exhibit 6.

district of Jefferson, Plaquemines and St. Bernard Parishes would demonstrate an approximate -9.3% deviation from the ideal district.[23] By contrast, a district consisting of Orleans and St. Bernard Parishes together would present a deviation of only 3.4% and a district consisting of Plaquemines and Jefferson Parishes would show a deviation of -20% from the ideal district.

The defendants argue that a fairly drawn district could consist of Plaquemines, St. Bernard and Orleans Parishes, with a deviation of only 1.1% from the ideal district.[24] Such a district is also geographically compact, but would have a black voter registration of only 45.3%. Moreover, a district thus drawn would isolate Jefferson Parish as a district, with a deviation of -24.3% from the ideal, unless of course further redistricting is done affecting parishes and voting

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[23] The Court's calculations of percentage deviations based on stipulated data yielded the same figures as set forth in Weber's Report, Table 11, p.50.

[24] See Weber Report, p.53.

districts not presently under consideration or before this Court.[25]

Thus, if two districts were drawn without crossing parish boundaries (as is the case in the rest of the state) and if the "ideal district" were based upon population alone, no single member district may fairly be drawn in which blacks would constitute a majority of the voting age population and registered voters. Either Jefferson Parish or Orleans Parish would have to be isolated in such a districting scheme, leaving a second district with an atypically low voter population. Moreover, to date, no parish is isolated as a single district in this state. The Court does not find any of the suggested divisions of the First District to be a particularly "ideal" result.[26] It appears the only way to

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[25] Any such redistricting would best be done by the state legislature, which may revise the Supreme Court districts by a 2/3 vote of each house. See Pre-Trial Order Stipulation 11, p.26.

[26] This should not be construed as a determination at this time by the Court that if a remedy were required the Court must adhere to parish boundaries in creating new districts.

provide a sizable single member district in which blacks would constitute a voting age majority would be to create a gerrymandering district lacking geographical compactness.

II. Political Cohesion and Racially Polarized Voting

A wide range of evidence was made available to the Court for the purpose of evaluating whether plaintiffs' minority is so politically cohesive that the districting here in question thwarts distinct minority interests. Such evidence is also relevant to the related question of whether racial bloc voting has occurred within the First Supreme Court District.

Evidence relevant to these issues includes data pertaining to judicial and nonjudicial elections to be evaluated against the overall political background in the New Orleans area.

The Court will first offer some preliminary findings bearing generally upon the scope of evidence to be considered and upon the use of statistical data. The Court will next discuss the historical background of minority

discrimination leading to the present claims. A detailed analysis of facts pertinent to both the issues of political cohesion and racial bloc voting will follow.

The Court finds that judicial elections are sufficiently different from elections for legislative and administrative offices to warrant caution in making inferences about voter behavior using the techniques employed to analyze voter polarization and vote dilution in those other types of elections.[27] In particular, judicial elections as contrasted to those other elections are characterized by lower turnout, higher roll-off rates, and by less voter interest. For example, analyses of the level of competition for judicial offices compared to state legislative offices within the four parish area of the First Supreme Court District during the past decade indicate that almost 64 percent of judicial races have been uncontested, whereas only about 30 percent of

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[27] See generally Weber Report, Defendants' Exhibit 2, pp.2-10. While relying upon Dr. Weber's report, the Court finds much of the matter here discussed is general knowledge of which the Court might properly take judicial notice.

state senate and house of representatives elections have gone uncontested. The number of candidates for judicial offices is particularly low in the election years when the terms of incumbent judicial officers expired. However, the Court has also considered the testimony, statistical evidence, and expert reports pertaining to other elections, and the Court generally finds that such evidence is consistent with the import of data from judicial elections, even though the Court is inclined to give evidence relating to judicial elections greater weight.

In analyzing statistical data, the Court finds that the best available data for estimating the voting behavior of various groups in the electorate would come from exit polls conducted upon a random sample of voters surveyed as they leave the polling place on election day, but such evidence is not available. The best available data for estimating the participation of various groups in the electorate is sign-in data contained in the official records of the Parish Registrar of Voters. The best indicator of participation is obtained by

dividing the number of persons who signed-in to vote by the number of persons in the voting age population.

In the absence of exit poll, sign-in, and voting age population data, analysts employ the bivariate ecological regression technique[28] to estimate the voting behavior of various groups in the electorate. Because this analysis produces only an estimate of voting behavior, the Court finds it should consider, but is not necessarily in a position to consider, what factors are present in the analysis, such as: the number of cases; variations of the independent and dependent variables; the timing of electoral data as compared to the sign-in, voter registration, or the voting age population data; and comparability of the geographical units (usually precincts) used in the analysis. From the record before it,

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[28] "Regression analysis is a statistical technique that can be used to develop a mathematical equation showing how variables are related." D. Anderson, D. Sweeney and T. Williams, Statistics for Business and Economics, 406 (2d Ed. 1981). The variable being predicted by the mathematical equation (in this case, the percentage of the vote won by each candidate) is the dependent variable. The variables used to predict the value of the dependent variable are the independent variables. In this case, the independent variables are the percentages of voters who are black or white. See Weber Report, Defendants' Exhibit 2, pp.10-11.

the Court is definitely not in a position to assess other important aspects of statistical analyses, such as use of proper procedures to verify the accuracy of the data, and proper functioning of a statistical analysis computer program. A further challenge is to avoid becoming entrenched in a "numbers game" that obscures the forest for the trees. The parties have often times been of scant assistance by offering numerical data (such as the total percentage deviations from ideal districting) lacking in readily apparent meaning. It thus appears that precise correlation between the race of voters and their voting preferences cannot be made on the basis of the statistical analyses presented. However, no better data is provided, and the Court has given the statistical data considerable weight.[29]

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[29] This Court has additional reservations regarding use of much of the statistical analyses here presented, which reservations are expressed in the Court's opinion on plaintiffs' motion for preliminary injunction. See Chisom v. Edwards, 690 F.Supp. 1524, 1528 & n.25 (E.D.La.), vacated 850 F.2d 1051, reh'g denied, 857 F.2d 1473 (5th Cir. 1988).

In any event, whether testimony, stipulated data, or statistical analysis is cited, the Court's evaluation of the presence of political cohesion and racially polarized voting includes consideration of the race of the voters, the race of the candidates, and the access the minority has had to the political process.

A. Access to the Political Process -- Effect of Past Discrimination[30]

The Court's analysis of the presence of racial bloc voting and political cohesion must be made against a background evaluation of the extent to which political opportunities are presently hampered by vestiges of past discrimination.[31] The Court's historical findings are based

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[30] Monroe v. City of Woodville, No. 88-4433, slip op. (5th Cir. Aug.30, 1989), suggests that the Court need not reach the Thornburg totality of the circumstances inquiry, if it finds that the plaintiffs fail to establish all three elements of the initial 3-part test in Thornburg. This Court nonetheless makes the following findings, in part to provide a full record of findings and in part because the inquiry into these elements overlaps to some extent the inquiry into political cohesion and bloc voting.

[31] See Thornburg v. Gingles, 478 U.S.30, 106 S.Ct. 2752, 2776, 92 L.Ed.2d 25 (1986).

primarily upon stipulated facts, with reference to live testimony where indicated.

1. Voting

Louisiana has had a past history of official discrimination bearing upon the right to vote. In this regard, the parties stipulated[32] to most facts found by the three judge panel in Major v. Treen,[33] including the imposition in 1898 of property and educational qualifications on the franchise, and the enactment of a "grandfather" clause[34] to allow whites, but not similarly situated blacks, to vote even when they did otherwise qualify. In 1923, Louisiana authorized white only primaries, which continued until their invalidation

[32] See Pre-Trial Order Stipulations 36-38, p.38.

[33] 574 F.Supp. 325 (E.D.La. 1983).

[34] In Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), the Supreme Court ruled that "grandfather" clauses violated the Fifteenth Amendment. The state then amended its constitution to replace the "grandfather" clause with a requirement that an applicant "give a reasonable interpretation" of any section of the federal or state constitution as a prerequisite to voter registration. In Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), the Supreme Court held the "interpretation" test to be another aspect of illegal disenfranchisement.

in 1944.[35] In the 1950s, Louisiana instituted "citizenship" tests and anti-single-shot voting laws.[36] In 1959, the State Democratic Party adopted a majority vote requirement for election of party officers.[37]

The State of Louisiana is also subject to special provisions of the Voting Rights Act because in 1965 it employed a "test or device," as defined in the Act, as a prerequisite to register to vote. Less than fifty percent of the voting age population (at that time 21 years of age or older) voted in the 1964 presidential election. Moreover, since the enactment of the 1965 Voting Rights Act, federal examiners have been appointed to enforce the Act's provisions in twelve Louisiana parishes including, from the

[35] See Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 1052, 88 L.Ed. 1594 (1944).

[36] For a description of single-shot bullet voting, see Thornburg v. Gingles, 478 U.S. at 38, n.5, 106 S.Ct. at 2760, n.5; City of Rome v. United States, 446 U.S. 156, 184 n.19, 100 S.Ct. 1548, 1565 n.19, 64 L.Ed.2d 119 (1980).

[37] See Pre-Trial Order Stipulation 42 at p.39.

First District, Plaquemines Parish.[38] The federal examiners then listed a total of 26,978 persons as eligible to vote in those parishes;[39] of that number 25,138 (93.18 percent) were black. As of January 1, 1989, 15,432 persons remained on the voting rolls as federally listed voters, who are presumed not otherwise registered to vote.[40] At the time of Plaquemines' designation, only 96 black persons in the parish were registered to vote. However, by October 1967, federal examiners had listed 1,254 black persons in Plaquemines Parish, resulting in an increase in the number of black persons registered to vote in Plaquemines Parish from 96 to over 1,300.[41]

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[38] See 42 U.S.C. §1973d; Pre-Trial Order Stipulation 44, pp.39-40.

[39] See 42 U.S.C. §1973e(b); Pre-Trial Order Stipulation 44, pp.39-40.

[40] See 42 U.S.C. §1973e(a); Pre-Trial Order Stipulation 44, pp.39-40.

[41] See Pre-Trial Order Stipulation 45, p.40.

In sum, notwithstanding historic disenfranchisement, voter registration since 1965 has demonstrated generally increased participation by black voters, and today no state action or laws prevent black participation in the electoral process. In the summer of 1984, the most recent analysis of voter registration by race showed over seventy percent of both races are registered to vote and that the gap in between black and white voter registration continues to close. In fact, as previously indicated, black voter registration now exceeds white voter registration in Orleans Parish.

2. The History of the Redistricting Plan Here in Question

For the past 110 years, the First Supreme Court District has encompassed the greater metropolitan New Orleans area. The present districting plan for the Supreme Court, which includes the First Supreme Court District consisting of the parishes of Orleans, St. Bernard, Plaquemines and Jefferson, was first drafted in the 1879 Constitution for the State of Louisiana. Since that time, the voters in the First Supreme

Court District have elected two justices on the Supreme Court. In each of the Constitutions since then, 1898, 1913, 1921 and 1974, this districting plan has been readopted without objection. After the 1974 Constitution had been ratified, the United States of America, through the Justice Department, precleared the Constitution electing not to challenge the composition of the districts and the number of justices to be elected from each district. Cognizant of the factors identified in Overton v. City of Austin, 871 F.2d 529, 540 (5th Cir. 1989), this Court finds that the creation of the present First Supreme Court districting scheme was not devised for discriminatory purposes. The district was created because the parishes of Orleans, St. Bernard, Plaquemines and Jefferson were considered an inseparable metropolitan or quasi-metropolitan area.

Access to the political process is further confirmed by the history of the present districting plan, which is set forth in the 1974 Louisiana Constitution. The delegates to

Louisiana's 1973 Constitutional Convention were 132 in number. There were 105 elected delegates, all of whom were elected from their respective districts of the Louisiana House of Representatives. The remaining delegates, 27 in number, were appointed by the Governor to represent various facets of the Louisiana populace. Twelve of the delegates were black.[42] Each delegate to the convention, whether elected or appointed, had the right to select committee assignments.[43] None of the blacks chose to be on the Judiciary Committee; therefore, the Judiciary Committee for the 1973 Constitutional Convention consisted of eighteen delegates, all of whom were white.

The voting record of black delegates for the districting plan and its amendments shows the following:

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[42] A listing of the names, status as elected or appointed, and home districts of the black delegates appears in the Appendix to this Opinion, Table 4.

[43] See Records of the 1973 Louisiana Constitutional Convention, vol. 1, pp.6 and 35, Rule 51.

A proposed amendment to divide the state into seven Supreme Court Districts with a Justice elected from each district was defeated by a vote of 85-27, with a black delegate vote of one for the amendment, eleven against, and one absent.

A proposed amendment to divide the state into seven equally apportioned Supreme Court Districts with a Justice elected from each district was defeated by a vote of 67-47, with a black delegate vote of seven for the amendment, four against, and one absent.

Another amendment proposed that after January 1, 1975, the legislature divide the first district (Jefferson, Orleans, Plaquemines, and St. Bernard Parishes) into two districts with one Justice to be elected from each district. In support of this amendment, a white delegate argued:

> We have seven Supreme Court Justices, yet we have six supreme court districts, two being elected from one. If I follow the feeling of this constitutional right, we argued single member districts. Why should we make an exception here, why here? Why provide that district one is going

> to have two Justices and the rest of the districts are going to have one? Why not have seven districts?[44]

A black delegate elected from Legislative District 97 in Orleans Parish argued that the present arrangement of the Supreme Court Districts should not be changed.[45] This amendment was defeated by a vote of 63-50, with a black delegate vote of five for the amendment, and seven against.

The final districting plan, providing for six Supreme Court Districts, was adopted by a total vote of 103-9, with a black delegate vote of eight for the final plan, one against, and two absent.[46] The Constitution proposed by the 1973 Convention was approved by the federal Department of Justice[47] and ratified by the voters on April 20, 1974. The present districting may now be altered by a two-thirds vote

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[44] Id. vol. VI, p.720.

[45] Id. at 714-15.

[46] See Pre-Trial Order Stipulation 31, pp.37-38. The parties' stipulation does not account for the twelfth delegate.

[47] See 42 U.S.C. §1973c (1982). See also Chisom v. Edwards, 690 F.Supp. 1524, 1525 & n.4 (E.D.La. 1988).

of the elected members of each house of the legislature.[48] Although certain proposals are pending, no amendment is forthcoming as of this date.

3. Other Discrimination

In addition to data pertaining to franchisement, other stipulated data demonstrate the discrimination in education, housing, employment, and general access to political processes that has sadly figured prominently in Louisiana's history.[49] For example, Louisiana enforced a policy of racial segregation in public education prior to 1954, in transportation prior to 1964, and in accommodations prior to 1964, until these practices were outlawed by the United States Supreme Court and Congress.

Vestiges of such discrimination still exist, as in the State's system of higher public education; as recently as

[48] See Pre-Trial Order Stipulation 11, p.26 and note 15 supra.

[49] The Court will not detail here the parties' Stipulations in this regard, appearing in the Pre-Trial Order as Stipulations 36-45 at pp.38-40 and 93-99 at pp.53-54.

August 1988, a panel of three judges found Louisiana higher public education operated as a dual system.[50] A prime example of such vestiges of past discrimination can be found in the legal profession, an important point of access to the political process. Until 1947, no black persons were admitted to law school in Louisiana. At the present time, Louisiana operates two public law schools: Southern University attended by virtually all of the State's public black law student population and the academically superior LSU Law School, attended by most of the white public student population.[51] All the current officers of the Louisiana Bar Association are white, and no black judge has ever served as one of the officers of the Louisiana District Judges Association. The Court further accepts the testimony of Judge Revius O. Ortique that the New Orleans Bar

[50] See United States v. State of Louisiana, 692 F.Supp. 642 (E.D.La. 1988).

[51] In making these findings, the Court takes judicial notice of facts in the record of proceedings before the three judge Panel in United States v. State of Louisiana, Civil Action 80-3300.

Association has never endorsed a black candidate.

The relatively lower economic status of local black residents further affects accessibility to better education and such practicalities as campaign funding.[52] In this regard, both Judge Ortique and Judge Bernette Johnson testified that black candidates have considerable difficulty raising campaign funds and that generally, the better funded candidates win.

4. Recent Access to Political Candidacy

Black candidacy is a relatively recent phenomenon, and the parties' stipulations detail the extent to which blacks have been unsuccessful in their bids for judicial office and/or have not run for judicial office. The Court heard testimony from several unsuccessful black judicial candidates, including Civil District Court Section "H" Judge Revius Ortique, who testified regarding his unsuccessful bid for a seat on the Supreme Court in 1972; Melvin Zeno, Assistant District

[52] See Pre-Trial Order Stipulations 101-9, pp.54-55.

Attorney for Jefferson Parish and practicing attorney, who was unsuccessful in a bid for Division "L" of the 14th Judicial District Court in Jefferson Parish; and Anderson Council, who testified regarding his unsuccessful 1987 bid for Juvenile Court Judge in Jefferson Parish. The court also heard testimony from Edwin Lombard concerning his unsuccessful bid for the statewide office of Secretary of State in 1987.

Melvin Zeno testified that he maintained a low profile during his campaign in order to keep his race unknown. Mr. Zeno turned down personal appearances and excluded certain of his qualifications from his campaign materials for the purpose of obscuring his race. Additionally, Mr. Zeno's opponent was an area attorney who had been a state legislator for approximately five to seven years and had good name recognition in Jefferson Parish. Mr. Zeno also testified that he spent only half what his opponent spent in

campaigning for the judicial seat.[53]

Likewise, Anderson Council testified that he maintained low visibility during his campaign in an attempt to keep the white public from learning he was black. Mr. Council also testified that he spent only 5% of the total campaign moneys spent by all the candidates.[54]

In the 1987 statewide election for Secretary of State, Rudy Lombard had the same name recognition problem that Melvin Zeno encountered. Mr. Lombard ran opposite Fox McKeithen, a candidate with great name recognition due to the fact that his father was a former governor of the state. In the statewide election, Mr. Lombard did not advance to the runoff; however, the returns from the primary parishes in the First Supreme Court District show that Lombard was the leader. If the returns in the rest of the state had been like those in the First Supreme Court District, Mr. Lombard

[53] See Transcript p. 81.

[54] See Transcript p. 92.

would have made the runoff as the election front runner.[55]

In addition, the Court heard testimony from Civil District Court Section "I" Judge Bernette Johnson, who testified that she would not run for the Supreme Court notwithstanding her perceived qualifications because of her speculation that she would not win. Stipulated statistical data pertaining to election of judicial offices elected on a parish-wide basis in the First Supreme Court District shows that black persons currently serve as judges only in Orleans Parish.[56]

For example, only two black persons have ever run for a seat as Justice of the Louisiana Supreme Court in this century; no black person has been elected to the Louisiana Supreme Court in this century; and the only black person to serve on the Supreme Court in this century was attorney Jessie Stone, who was apppointed to a vacancy on the

[55] See Appendix to this opinion, Table 6.

[56] See Appendix Tables 1 and 3.

Louisiana Supreme Court for a period of 17 days, from November 2, 1979, through November 19, 1979. Nevertheless, the significance of black candidacy must be remarked, however recent its development.

The two black candidates ran in special elections for the two seats from the First Supreme Court District in 1972. Each chose to become a candidate for a different seat, but the evidence fails to demonstrate this candidacy or the outcome were dictated by racial factors. Judge Revius Ortique chose to run against three white candidates, including present Justice Pascal Calogero, one of the more "liberal" Justices, rather than to compete with Justice Marcus, one of the more "conservative" judges, because like Justice Calogero, Judge Ortique had no prior judicial experience at that time. Earl J. Amedee competed against four white candidates for the other position. However, in light of the candidates' failure to obtain the support of the black communities, discussed below, the court cannot find

that their candidacy was limited by vestiges of past segregation. Rather, their participation suggests increasing access to judicial candidacy.

It is true that since January 1978, a position in the First Supreme Court District has been filled by contested primary elections in 1980 and 1988, and there were no black candidates in either of the elections. Judge Ortique and Judge Johnson both testified they would not run again because they cannot win. The Court rejects this testimony as speculative, and lacking probative value; if black candidates do not run and increase their notoriety, they surely cannot win.

Notwithstanding Louisiana's history of discrimination, the recent careers of several of New Orleans' black politicians demonstrate the increased access minority members have had to local political processes, including the judiciary. While such success is usually due to large support by the black community, the white vote has contributed

significantly to the election of black candidates.

Such increased political access is demonstrated by the political career of former New Orleans Mayor Ernest Morial. He was the first black person to serve on the Louisiana Court of Appeal in this century, elected in 1972 in a contested election against a white candidate to a seat from District 1 of the 4th Circuit Court of Appeal (Orleans Parish). At the time of his election, Mr. Morial was a judge on the Orleans Parish Juvenile Court, a position to which he was appointed in 1970. He served on the court of appeal until 1977 when he resigned to become Mayor of the City of New Orleans.

No black person has served on the court of appeal in this century from an election district encompassing Jefferson, St. Bernard or Plaquemines Parish, but the recent history of the Orleans Parish Civil District Court presents a different picture:

Israel Augustine, a black lawyer, was unopposed in his 1981 election to an open seat on District 1 of the 4th Circuit Court of Appeal (Orleans Parish). At the time of his election, Mr. Augustine was serving as a member of the Criminal District Court of Orleans Parish. Joan Armstrong, a black lawyer, was unopposed in her 1984 election to an open seat on District 1 of the 4th Circuit Court of Appeal (Orleans Parish). At the time of her election, Ms. Armstrong was serving as a judge in the Juvenile Court of Orleans Parish, a position she served by appointment following Morial's resignation in 1972 to run for the 4th Circuit Court.

Judge Ortique was the first black person to serve on the Orleans Parish Civil District Court, having been recommended for appointment as ad hoc judge in Division B of the court by Justices Calogero and Marcus in 1978. Judge Ortique was serving as an ad hoc judge, when he defeated a white challenger for Division H of the court in

1979. He was unopposed for reelection in 1984.

In 1984, Judge Bernette Johnson became the first black candidate to defeat a white candidate in a contest for an open seat on the Orleans Parish Civil District Court. In 1986, Yada Magee, a black lawyer, defeated a white candidate in a contest for an open seat on the Orleans Parish Civil District Court.

The first black person to serve on the Orleans Parish Criminal District Court in this century was Israel Augustine who was appointed in 1969. As an incumbent, Judge Augustine defeated two white challengers in the 1970 Democratic primary election to become the unopposed Democratic nominee in the general election. He served on the Orleans Parish Criminal District Court until 1981 when he was elected to the court of appeal. No black person, other than Israel Augustine, has been elected to the Orleans Parish Criminal District Court in this century.

In 1984, Ernestine Gray became the first and only black

person in this century to defeat a white candidate in a contest for an open seat on the Orleans Parish Juvenile Court. In 1988, Dennis Dannel became the first and only black person in this century to defeat a white incumbent candidate in a contest for the Orleans Parish Traffic Court. No other black person has been elected as an Orleans Parish Traffic Court judge in this century.

In 1986, Bruce McConduit became the first and only black person in this century to defeat a white candidate in a contest for an open seat for the Orleans Parish Municipal Court. No other black person has been elected as a municipal court judge in Orleans Parish in this century.

In this century, no black person has served as a judge in St. Bernard of Plaquemines Parish, but since 1978, no black persons have been candidates for a judgeship in the parishes of St. Bernard and Palquemines. In this century, no black person has been elected to the First or Second City Court for New Orleans. Since 1978, no black candidate has

been elected in a contested election to parish-wide office in St. Bernard, Plaquemines and Jefferson.

The above facts show many areas of judicial office in which black candidates have not participated. However, this Court is not prepared to make a blanket finding of restricted access to candidacy, given recent significant strides in this area. Moreover, at least in so far as relates to the recent elections of Orleans Parish Criminal Court Judges and Orleans Traffic Court Judges, blacks have crossed race lines.

5. Other Thornburg Factors

The Court further notes that there is no suggestion or record evidence of racial overtones or appeals in judicial or other elections, nor of a lack of responsiveness on the part of judges or other elected officials to the particularized needs of the members of the minority group.

B. Analysis of Racial Block Voting and Cohesion

1. The Judiciary

Since 1976, candidates for judicial office do not run in

partisan elections. Instead, all candidates for all of the offices to be elected on a given date run in the open primary election. However, a candidate's political party enrollment is indicated on the ballot. There is a majority-vote requirement in elections for judicial office. If no candidate receives a majority of the vote in the primary, the top two vote-getters then compete in a general election. Parish-wide judicial offices are elected to a designated position.

a. Elections for Supreme Court Justices from the First District

Since January 1978, a position on the Supreme Court for the State of Louisiana has been filled by contested elections in 1980 and 1988. These contested positions were filled in the primary elections. There were no black candidates in either of the elections. However, weighted regression analysis suggests the following allocation of votes:[57]

[57] See Weber Report, Appendix B, pp. B-1, 2 and 3.

Year	Election	Winner	% of Black Voters for Winning Candidate	% of White Voters for Winning Candidate
1974	General	Calogero	98.3	71.0
1980	Primary	Marcus	77.5	69.7
1988	Primary	Calogero	59.9	64.7

Homogeneous Precinct Analyses show:

Year	Election	Winner	% of Black Voters for Winning Candidate	% of White Voters for Winning Candidate
1974	General	Calogero	96.4	71.0
1980	Primary	Marcus	75.3	69.3
1988	Primary	Calogero	59.3	64.9

Unweighted Regression Analyses suggest:

Year	Election	Winner	% of Black Voters for Winning Candidate	% of White Voters for Winning Candidate
1974	General	Calogero	98.6	71.7
1980	Primary	Marcus	77.9	71.2

1988	Primary	Calogero	60.7	65.7

Thus, the candidate supported by a majority of black voters was elected in each instance. Although no statistical evidence was presented concerning the racial voting patterns in the 1972 special election for the First Supreme Court District, a black candidate ran for both of the available seats. One candidate, Judge Ortique testified that there was a substantial number of blacks who crossed over and supported the white candidate.[58] Judge Ortique received 27,648 votes (14.0%) in the First Supreme Court District and 21,744 votes (20.7%) in Orleans Parish.[59] From the statistics that are available concerning the 1972 special election, it appears that there was a black crossover in the election for the second Supreme Court seat in the First District. In that

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[58] See Trial Transcript p. 30.

[59] For election results, see Appendix in this Opinion. Table 5. A majority of the black vote in Orleans would have to be 50% of 53.6%, or 26.8% of the black vote.

election, Mr. Amedee, the only black candidate, received only 11,872 votes (5.8%) in the First Supreme Court District and 8,997 votes (8.5%) in Orleans Parish, revealing that there was even a greater black crossover vote than in the Ortique/Calogero race.[60]

Based upon the foregoing, the Court finds there is no pattern of racial bloc voting in the four most recent elections for Supreme Court Justice from the First Supreme Court District.

b. Other Judicial Elections

Nor is there a usual pattern of defeat for the black minority's preferred candidates in the 75 other judicial elections within the four parishes of the First Supreme Court District between 1978 and the present.

Since January 1978, in the parishes that constitute the First District, there have been 51 instances in which one of the judicial positions have been filled by contested election.

[60] See Appendix in this Opinion, Table 5.

For these 51 contested judicial positions, 66 primary and general election contests have been held to fill the seats at issue. Black persons have participated as candidates against white persons for 21 of the contested judicial positions and in 30 of the primary and general elections conducted to fill those positions. The remaining 30 contested judicial positions and the 36 elections necessary to fill those positions involved white candidates only. Most importantly, however, the minority candidate of choice has been elected in 62.7% of the elections.[61]

Ecological regression analyses for 34 judicial elections (24 primaries and 10 general elections)[62] show that there is significant crossover voting among both white and black voters in judicial elections. A considerable number of black voters do not always support the black candidate, nor do the white voters always support the white candidate.

[61] See Appendix Table 2.

[62] See United States' Exhibit 16.

In addition, the Court heard testimony from Melvin Zeno who received significant endorsements from white Jefferson Parish officials and from primarily white political organizations in his bid for District Court Judge in Jefferson Parish during 1988.[63] The willingness of prominent white politicians to actively support black candidates demonstrates that crossover politics exists even in Jefferson Parish.

Lionel Collins was the first and only black person to serve as a judge in Jefferson Parish in this century. Judge Collins was appointed to a seat on the 24th Judicial District Court in 1978. As an incumbent, he was supported by prominent political factions and was unopposed for both his initial election to another seat in 1978 and for his reelection in 1984. Judge Collins died in April 1988 before completing his term in office.

There are two city courts in New Orleans for which judges are not elected on a parish-wide basis. All of the

[63] See Trial Transcript, pp. 67-68.

persons residing in Orleans Parish except for those persons who reside on the West Bank of the parish in the 15th Ward (Algiers) are eligible to vote for the three members of the First City Court for New Orleans. All persons residing on the West Bank of the parish in the 15th Ward (Algiers) are eligible to vote for one member of the Second City Court for New Orleans. Since 1978 there have been 4 instances in which a First City Court judgeship position has been filled by contested election, and 5 primary and general elections have been held to fill the 4 positions. Black persons have participated as candidates against white persons for 3 of the contested positions and in 4 of the elections held to fill those positions.

In 1988, black candidate Dennis Dannel achieved his victory for Orleans Parish Traffic Court Judge notwithstanding other black leaders' endorsements of Dannel's white opponent. For example, both former Mayor Ernest Morial and State Senator Bill Jefferson endorsed

white candidate Lambert Hassinger in his bid for reelection to Traffic Court against Dannel.[64]

2. Exogenous Elections

In the 1987 primary election for Secretary of State, there were two black candidates and seven white candidates.[65] Weighted ecological regression analysis for the 1987 primary election for Secretary of State indicates that in the four parishes that constitute the First District, over 80 percent of black voters and under 20 percent of white voters cast their votes for Edwin Lombard, a black candidate.

In the 1987 Secretary of State primary election, Edwin Lombard received 35 percent of the vote in the four parishes that comprise the First District, to finish as the plurality winner. He received a majority of the votes cast within Orleans Parish, but obtained only 20 percent of the votes cast in Jefferson, Plaquemines and St. Bernard Parishes.

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[64] See Times-Picayune 11/2/88, at B-3; 11/7/88, at B.2

[65] See Appendix Table 6.

Additional Findings

In First District elections, there is a majority-vote requirement and staggered terms; single-shot voting is not allowed.

Cross-over voting by voters of one race to support candidates of another race is occurring increasingly in Orleans Parish elections for non-judicial offices indicating a pattern of both white and black voters to look at factors other than the race of candidates in making election choices.

Cross-over voting by white voters to support black candidates for non-judicial offices in Orleans Parish occurs on a regular basis with the result that black candidates frequently win parish-wide offices such as mayor, councilman at-large, and school board posts.

Roll-off in Orleans Parish judicial elections by black voters is sometimes large enough to prevent black candidates from winning elections in which white candidates participate.

Moreover, black and white voters in Orleans Parish

participate at approximately equal rates in recent elections for major office (President, U.S. Senate, Governor, and Mayor).

Factual Conclusion

Based upon the totality of circumstances before the Court, the Court is unable to find, and the plaintiffs, for the reasons hereinabove stated have failed to prove by a preponderance of the evidence as a factual matter, that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive geographically insular minority group.[66] The overall present reality in the Court's view is not a picture of racial polarization to the detriment of the minority plaintiffs isolated in Orleans Parish, but rather is an emerging political process in Metropolitan New Orleans, wherein the talents of black individuals as leaders in the judiciary and in other traditionally political offices have been recognized by black and white voters. A brief

[66] In reaching this conclusion, the Court has given great weight to the expert reports of Dr. Ronald E. Weber and Dr. Robert S. Miller.

glimpse at the statistical evidence serves to demonstrate that black individuals constitute a clear minority of elected officials, who have risen to positions of political prominence primarily in Orleans Parish only, where the greatest number of black individuals in the Metropolitan area reside. But the black community has been able to elect their candidates of choice in a significant number of elections.[67]

In reaching this conclusion, the Court has noted the opinion testimony of Dr. Engstrom to the effect that racially polarized voting exists. However, as will be detailed below in the Court's discussion of the applicable law, the overall focus of the Court's inquiry must be whether the minority candidate can elect its candidates of choice. As this Court previously stated:

> Whether Dr. Engstrom's analysis in this case comports with what even the plurality was approving in Thornburg is unclear.

[67] While the Court's conclusion applies to the entire four-parish area of the First District, the Court finds that its conclusion is even stronger vis-a-vis the plaintiff-class, black Orleans Parish voters.

> While Dr. Engstrom centered his analysis in this case on the race of the candidates, the plurality stated that "the race of the candidate per se is irrelevant to racial bloc voting analysis." Id. at 67, 106 S. Ct. at 2775. But cf. id. at 68, 106 S. Ct. at 2775-76 ("Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites.").

Thus, while election and support of black candidates is important in the totality of circumstances, it is not determinative of a finding of racial cohesion or racially polarized voting.

While blacks support black candidates to a large degree, and whites white candidates, the Court finds enough crossover voting exists to prevent a finding of significant racial polarization, and while the evidence demonstrates the relatively small number of black persons holding office, this finding does not trigger the additional more important

finding that blacks in the first district have been unable to elect the candidates of their choice. The political reality in South Louisiana is that the support of the black community is a very important factor in the success of any political candidate. It is rare that one may succeed without it.[68]

Conclusions of Law

This Court has subject matter jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1432 and 42 U.S.C. § 1973C.

There are two issues of law:

> 1. Whether the multimember district system in Louisiana's First Supreme Court District violates Section 2(a) of the Voting Rights Act; and
>
> 2. Whether the multimember district system in Louisiana's First Supreme Court District violates the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

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[68] In addition to the facts recited heretofore, the Court in reading its conclusions herein has received and taken into consideration the 109 stipulations of fact set forth in paragraph 7 of the Pre-Trial Order of March 29, 1989.

The Court will address each issue in turn.

1. The Voting Rights Act

With respect to the first issue, the Fifth Circuit has previously determined in this litigation that section 2 generally applies to judicial elections.[69] However, the parties raise a threshold legal issue whether both subsections of section 2 apply to judicial elections or whether only subsection (a) is applicable. If only subsection (a) applies, defendants suggest only intentional acts of discrimination are prohibited. If both subsections apply, plaintiffs may prevail "by demonstrating that under a totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race."[70] In other words, under subsection (b), a "results test" may be used to evaluate the challenged election law or procedure.

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[69] Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), cert. denied, 109 S.Ct. 390 (1988).

[70] 839 F.2d at 1059.

Because of the Fifth Circuit's discussion (in its order of remand herein) of both subsections of section 2 and its reliance upon legislative history concerning subsection (b), it appears as a directive for this Court to apply both subsections of section 2 to this case.

However, defendants contend the resolution of this case is not governed by section 2(b) of the Act. Defendants assert that section 2(b) of the Voting Rights Act enshrines the "one man, one vote" principle as the touchstone test, which should not be used to analyze judicial elections, because the "one man, one vote" test was expressly rejected as applying to the judiciary in Wells v. Edwards, 347 F.Supp. 453 (M.D. La. 1972), aff'd 409 U.S. 1095, 93 S. Ct. 904, 34 L.Ed.2d 679 (1973).

The Wells litigation pre-dates the 1982 amendments to the Voting Act instituting the "results test." However, Wells has never been overruled and the law of the case is silent on Wells' viability.

If this Court's assumption as noted above is incorrect, and Wells applies as the governing standard, this Court would conclude without hesitation that plaintiffs have failed to prove discriminatory intent with respect to the scheme here at issue, and that therefore plaintiffs' Voting Rights Act claims must be dismissed. However, since the tenor of the Fifth Circuit's opinion in this case suggests otherwise, this Court is bound by that opinion as the law of the case.

Accordingly, this Court has evaluated the facts before it under the rules of Gingles and its progeny.[71] As stated by the Fifth Circuit:

> It has been widely recognized that "multimember district and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population." [Citing Gingles] Such schemes are not, however, per se violations of section 2. [citation omitted]

[71] See Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed. 2525 (1986) and cases cited in this Court's Opinion of July 28, 1988, Rec. Doc. no. 52, 690 F. Supp. 1524 (E.D. La. 1988).

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989). This Court must undertake "a searching practical evaluation of past and present reality," with a "functional view of the political process." Id. at 1204 (quoting Gingles).

Addressing the specific evidence necessary under section 2(b) to prove a section 2(a) violation, the Gingles plurality set forth three matters a minority group must prove: (1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that it is politically cohesive; and (3) that the white majority votes sufficiently in a bloc to enable it to usually defeat the minority's preferred candidate because the minority's submergence in a white multi-member district impedes the minority's ability to elect its chosen representatives. See 478 U.S. at 50-51, 106 S. Ct. at 2766-67, 92 L.Ed.2d 46-47; Campos v. City of Baytown, 840 F.2d 1240, 1243 (5th Cir. 1988), cert. denied, 109 S. Ct.

3213 (1989).

Other relevant but not necessary focal factors[72] are enumerated in the Senate Judiciary Committee majority report in respect of section 2[73] and include: the state's history of voting discrimination; the extent of racially polarized voting; the state's use of such voting practices as unusually large election districts, majority vote requirements and anti-single shot procedures;[74] access to candidate slating processes; the extent to which limited education and employment opportunities and health benefits hinder minority participation; racial appeals in political campaigns and the extent to which minority members have been elected to public office; elected officials' responsiveness to minority needs; and the viability of voting qualifications.

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[72] Gingles, 106 S. Ct. at 2765-66.

[73] This report accompanied the bill amending section 2 of the Voting Rights Act in June 29, 1982. See S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), USCCAN 1982, pp. 206-07, cited in Thornburg v. Gingles, supra, 106 S. Ct. at 2759-60.

[74] Bullet (single-shot) voting is denied in Gingles, 106 S. Ct. at 2760 n. 5.

In evaluating the statistics necessary for plaintiffs to prove racial bloc voting, this Court is bound by recent Fifth Circuit authority to consider statistical evidence from judicial elections and from exogenous elections.[75] However, in the instant case, there is no sparsity of data pertaining to judicial elections in which black candidates have run, and while the Court gives due consideration to data from exogenous elections, the Court concludes data from judicial elections should receive greater weight. Nevertheless, as previously indicated, the Court is of the opinion plaintiffs have failed to prove by a preponderance of the evidence, the existence of racial bloc voting as a matter of law.[76]

This conclusion is critical because multi-member districts and at large election schemes, are not per se violative of minority voters' rights.[77] Rather, plaintiffs must

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[75] See Westwego, 872 F.2d at 1206; Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987).

[76] To hold otherwise, the Court would be required to ignore the expert reports of Drs. Weber and Miller which the Court declines to do.

[77] Thornburg v. Gingles, supra, 106 S. Ct. at 2752.

prove that the use of a multi-member electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. This, the plaintiffs have not done. As detailed in the Court's findings of fact, the statistical evidence regarding judicial and non-judicial elections shows that the blacks have had full access to the political process and routinely elect their preferred candidates, often times joining forces with a significant portion of the white electorate, and creating significant crossover voting.

Plaintiffs would have the Court create an amoeba-shaped, wholly-metropolitan district unique among the Supreme Court districts in the state for the sole purpose of guaranteeing a black justice. In concluding, the Court stresses that the plaintiffs' goal appears wholly contrary to the express proviso in section 2 that "nothing in this section establishes a right to have [blacks] elected in numbers equal to their proportion in population."

2. The Fourteenth and Fifteenth Amendments

With respect to the second issue, "multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State." White v. Regester, 412 U.S. 755, 93 S. Ct. 2332, 2339 (1973). Proof of racially discriminatory intent or purpose is required to show a violation under either the fourteenth or fifteenth amendment. Kirksey v. City of Jackson, Miss., 663 F.2d 659 (5th Cir. 1981). Washington v. Davis, 426 U.S. 229, 239-241, 96 S. Ct. 2040 (1976). Plaintiffs have failed to prove as a matter of law that the present system by which Louisiana Supreme Court Justices are elected was instituted with specific intent to dilute, minimize or cancel the voting strength of plaintiffs. It is clear that an invidious discriminatory purpose was not a factor at all in the legislative decision to provide a multi-member district for the Louisiana First Supreme Court District. Such being the

case, plaintiffs have failed to prove any constitutional violation from the operation of the present voting scheme.

For the foregoing reasons, the Clerk of Court is directed to enter judgment in favor of defendants dismissing plaintiff's claims.

New Orleans, Louisiana, this 13th day of September, 1989.

S/
UNITED STATES DISTRICT JUDGE

[The text of the opinion is followed by an appendix of 7 statistical tables; because of the difficulty in reproducing the tables and at the suggestion of the Clerk of the Court, fifteen copies of the tables have been lodged with the Clerk for the Court's use.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8014

LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434,
Plaintiffs-Appellees,

and

JESSE OLIVER, ET AL.,
Intervening Plaintiffs-Appellees,

versus

WILLIAM P. CLEMENTS, ETC., ET AL.,
Defendants,

JIM MATTOX, ET AL.,
Defendants-Appellees,
Appellants,

versus

JUDGE F. HAROLD ENTZ, ETC.,
JUDGE SHAROLYN WOOD, ETC.
and GEORGE S. BAYOUD, JR., ETC.,
Defendants-Appellants,

and

TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges,
Appellants.

Appeal From the United States District Court
for the Western District of Texas

(September 28, 1990)

Before CLARK, Chief Judge,
GEE, POLITZ, KING, JOHNSON, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, AND BARKSDALE, Circuit Judges.* GEE, Circuit Judge:

Today we must decide whether Congress, by amending Section 2 of the Voting Rights Act in 1982 to add a "results" test for dilution of minority voting strength, meant to subject the selection of state judges to the same test as that for representative political offices by incorporating language from the Supreme Court decision in White v. Regester.[1] For reasons to be given -- and for the cardinal reason that judges need not be elected at all -- we conclude that it did not.

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*Judges Williams and Garwood took no part in the Court's deliberations or decision of this appeal. When this case was orally argued before and considered by the court, Judge Reavley was in regular active service. He participated in both the oral argument and the en banc conference.

In United States v. American-Foreign Steamship Co., 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), the Supreme Court, interpreting 28 U.S.C. § 371(b), decided which senior judges are eligible to participate in an en banc court. Compare United States v. Cocke, 399 F.2d 433, 435 n.4 (5th Cir. 1968) (en banc). As Judge Reavley reads the American-Foreign Steamship Co. opinion, he considers himself ineligible now to participate in the decision of this case, and he has not therefore done so.

[1] 412 U.S. 755 (1973)

In summary, these are that Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of representatives only; that as of the amendment's time judicial offices had never been viewed by any court as representative ones; that characterizing the functions of the judicial office as representative ones is factually false -- public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out; that, because of the highly intrusive nature of federal regulation of the means by which states select their own officials, legislation doing so should not be pushed beyond its clear language; and that, in view of these considerations, we should place such a construction on the 1982 enactment reluctantly and only if Congress has clearly mandated such a singular result.

We have carefully weighed the text and provenance of the statutory language against the opposing factors urged upon us as interpretive guides. Having done so, we conclude that the language of the 1982 amendment is clear and that it extends the Congressional non-Constitutional "results" test for vote dilution claims no further than the legislative and executive branches, leaving the underlying, Constitutional "intent" test in place as to all three. Especially telling, we conclude, is the circumstance that in borrowing language from the Court's White opinion Congress focused upon its reference to electing "legislators," broadening it so far, but only so far, as to electing "representatives," a term inclusive of elective members of the executive branch as well as of the legislature but not -- as, say, "state officials" would have been -- of members of the judiciary. That Congress did exactly as we have described is as undeniable as it is inexplicable on any basis other than that of a legislative purpose to include all elected

legislative and executive state officials but to exclude elected judges.

Finally, and bearing in mind the well-settled principle of statutory construction that the enacting Legislator is presumed to have been aware of the judicial construction of existing law,[2] we note that, as of the time of the addition of Section 2(b) and of the explicit results test to the Voting Rights Act, every federal court which had considered the question had concluded that state judges were not "representatives" and did not fall within the definition of that term. Had Congress, then, meant to exclude votes in judicial elections from the ambit of its new results test, it could scarcely have done so more plainly than by adopting the term "representative" to describe that ambit.

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[2] See, e.g., Shapiro v. United States, 335 U.S. 1, 16 (1948); United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir.), cert. denied, 454 U.S. 1083 (1981).

Facts and Procedural History

The underlying facts of this appeal are carefully and correctly set out in the panel opinion, 902 F.2d 293 (5th Cir. 1990); we recapitulate them here no further than is necessary to an understanding of what we write today.

Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength. In a bench trial, the federal court rejected their constitutional arguments grounded in the Fourteenth and Fifteenth Amendments, finding a failure to prove the requisite discriminatory intent for relief under those provisions. The court determined, however, that the Texas law produced an unintended dilution of minority voting strength, a circumstance sufficient to call for relief under the Voting Rights Act, as amended in 1982 to incorporate a "results" test dispensing with the necessity of

proof of discriminatory intent. In consequence, and after pausing to allow for possible remedial action by the state, the court enjoined further use of the at-large system, confected and imposed a system of single-member elections, and directed that these be held last Spring.

On appeal, we stayed the court's order, expedited the appeal, held a panel hearing on April 30, and handed down an opinion on May 11. Four days later, pursuant to a majority vote of active judges, we ordered rehearing of the appeal en banc; and we now render our opinion.

Analysis

The Panel Opinion

At the time of its decision, our panel was constrained by an earlier decision of the Circuit holding that Section 2 of the Act applied to elections held to fill positions on the Louisiana Supreme Court, a seven-member body.[3] Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988). Constraint was

[3] It is the settled law of our Circuit that one panel of the Court does not overrule another. Ryals v. Estelle, 661 F.2d 904 (5th Cir. 1981).

superfluous, however; for the panel embraced and agreed with the holding and reasoning of Chisom applying the Act to judicial elections. It went on, however, to conclude that although in its view judges were indeed "representatives of the people," and although as their representatives the judges' elections were controlled by Section 2(b) of the Act, the elections of trial judges were not subject to voter-strength dilution concerns because their offices are single-member ones; and there is no such thing as a "share" of a single-member office. LULAC v. Clements, 902 F.2d 293, 305 (5th Cir. 1990). See Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986) (offices of mayor, council president, comptroller are single-member ones) and United States v. Dallas County, Ala., 850 F.2d 1433 (11th Cir. 1988) (county probate judge). A vigorous dissent by Judge Johnson, author of the panel opinion in Chisom, disputed the panel majority's characterization of judges from multi-judge districts as

holders of single-member offices. We need not resolve this disagreement within the panel, however, as we do not reach the issue.

Statutory Background

Originally enacted in 1965 as an anti-test, anti-device provision to relieve blacks of state-law strictures imposed upon their Fifteenth Amendment voting rights, Section 2 of the Voting Rights Act was construed by the Supreme Court in Mobile v. Bolden, 446 U.S. 55 (1980), as adding nothing to the Fourteenth and Fifteenth Amendment claims there made and as requiring, for its enforcement, proof of racially-discriminatory intent. At the time of Bolden, Section 2 read:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress reacted to Bolden by amending Section 2 to add to the statute a limited "results" test, to be applied and

administered "as provided in subsection (b) of this section."

As amended, Section 2 was cast in two subsections:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Earlier, in the course of deciding White, a 1973 voting rights case invoking constitutional grounds, the Court had described the required standard of proof in felicitous terms:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 766 (emphasis added). Casting about for appropriate language in which to couch its new subsection, and having inserted the reference to results in old Section 2, Congress settled upon the italicized portion of Justice White's opinion quoted above, adopting it with only one significant alteration.

New subsection (b), then, is patterned on the White court's language and provides with great specificity how violations of the newly incorporated results test must be established: a violation is shown on a demonstration, by the totality of the circumstances, that state (or political

subdivision) nomination and election processes for representatives of the people's choice are not as open to minority voters as to others. The precise language of the section is significant; a violation is shown, it declares, if it is established that members of the protected classes

> have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[4]

Both the broad and general opportunity to participate in the political process and the specific one to elect representatives are thus treated in the new section.[5] As for the former, protecting it appears to involve all of the primal anti-test, anti-device concerns and prohibitions of original Section 2; and its provisions may well extend to all elections

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[4] As we note in text, the section goes on to specify that election success of class members is a circumstance to be considered and to disavow specifically any intent to mandate proportionate representation by race.

[5] Not all aspects of that process pertain to elections, e.g., the celebrated New England town meeting.

whatever, as did they.[6] These broader considerations center on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, these safeguards may apply as in any other election, a matter not presented for decision today. The second consideration -- opportunity to elect representatives of one's choice -- is also couched in the language borrowed from White v. Regester, 412 U.S. 755, 766 (1973); and, as we have noted, the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning. Before pursuing this aspect of our inquiry further, however, we turn aside to consider briefly the nature of the judicial office and two other closely

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[6] That scope is not at issue today, the trial court having found an absence of discriminatory intent; and we do not decide it. We point out, however, that there can be no doubt whatever that the provisions of the Fourteenth and Fifteenth Amendments, enforceable by means of Section 1983 actions, apply to judicial elections to forbid intentional discrimination in any aspect of them. City of Mobile v. Bolden, 446 U.S. 55 (1980); Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980).

related topics: judicial selection and the state of authority on judges' status as representatives.

The Judicial Office

Senators and members of the House of Representatives hold clearly political offices. Today, both are directly elected by the people; and it is their function as representatives to synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues.[7] The executive branch of the government, headed by our highest officer elected at large in the nation,

[7] James Madison, discussing the unique relationship of the representative to his constituents, for example, referred to a relationship of "intimate sympathy" between the elected and his electors, and argued that a legislator should fee an "immediate dependence" upon the will of his constituents. Frequent elections, according to Madison, are the only way to ensure this sort of relationship. Only by requiring legislators to return periodically to their constituents to seek their ongoing support and input, can the communication between the voters and their representatives that is essential to the maintenance of democratic government take place. Congress is a "popular" institution; it is, therefore inherently political.

Hickok, Judicial Selection: The Political Roots of Advice and Consent in Judicial Selection: Merit, Ideology, and Politics 4 (National Legal Center for the Public Interest 1990).

is also expected to bring the views and opinions which he offered the electorate in seeking the Presidency to bear on the job of running the federal machinery.

By contrast, the judiciary serves no representative function whatever: the judge represents no one.[8] As Professor Eugene Hickok has recently observed, in terms upon which we cannot improve:

> The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive. The purpose of the judiciary is not to reflect public opinion in its deliberations or to satisfy public opinion with its decisions. Rather, it is to ensure that the ordinary laws do not run contrary to the more fundamental law of the Constitution, to resolve disputes and controversies surrounding the law, and to resolve disputes among contesting parties over the meaning

[8] That this is the case is strongly implied in the Constitution, which provides for an appointive federal judiciary and was adopted by thirteen states, none of which had an elective one. Yet the Framers believed they were confecting a federal republic, and Article 4, Section 4, of the Constitution guarantees "to every State in this Union a Republican Form of Government. . . ." But if judges hold representative offices, or represent any constituency, appointing them is scarcely consistent with a republican system, defined by the Third Edition of Webster's Unabridged as "[A] government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives . . . ."

of the law and the Constitution. If a member of congress serves to make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. A judge might find, for example, a very popular law to be unconstitutional. Indeed, it can be argued that the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.

Hickok, op. cit. supra n.7, at 5.

Thus the scholar, and with one voice the case authority of the time agreed. In 1982, as of the time of Congress's adoption of the Court's language from White, at least fifteen published opinions by federal courts -- opinions which we list in the margin -- had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections.[9] Not one had held the contrary.

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[9] Sagan v. Commonwealth of Pennsylvania, 542 F. Supp. 880 (W.D. Pa. 1982), appeal dismissed, 714 F.2d 124 (3rd Cir. 1983) (cross filing permitted by candidates for judicial office, prohibited for legislative and executive candidates)

Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 473 F. Supp. 334 (S.D. Ohio 1977)

The Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. D.C. 1975), cert. denied, 424 U.S. 933, 47 L.Ed.2d 341 (1976)

Fahey v. Darigan, 405 F. Supp. 1386 (D.C.R.I. 1975)

Gilday v. Board of Elections of Hamilton County, Ohio, 472 F.2d 214 (6th Cir. 1972)

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095, 34 L.Ed.2d 679 (1973)

Buchanan v. Gilligan, 349 F. Supp. 569 (N.D. Ohio 1972)

Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807, 34 L.Ed.2d 68 (1972)

Sullivan v. Alabama State Bar, 295 F. Supp. 1216 (M.D. Ala.), aff'd per curiam, 394 U.S. 812, 22 L.Ed.2d 749 (1969) (involving Board of Commissioners of Alabama State Bar)

Irish v. Democratic-Farmer-Labor Party of Minnesota, 287 F. Supp. 794 (D.C. Minn.), aff'd, 399 F.2d 119 (8th Cir. 1968)

Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), appeal dismissed, 385 U.S. 3, 17 L.Ed.2d 3 (1966), and vacated, 400 F.2d 882 (6th Cir. 1968), cert. denied, 393 U.S. 839, 21 L.Ed.2d 110 (1968)

N.Y. State Assn. of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967)

Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967)

Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966)

Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964)

Typical of these is the opinion in Wells v. Edwards, a decision by a three-judge district court from our own circuit which was affirmed on appeal by the Supreme Court.[10] There, after reviewing various authorities, the district court expressed the entire rationale of its view as follows:

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

Since 1982 a few courts have held that the use of the term "representatives" in Section 2 does not necessarily exclude judges. See Southern Christian Leadership Conference of Alabama v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989); Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988); Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987). (All recognizing that the "one-man, one-vote" principle does not apply to judicial elections and that, unlike legislators, judges do not "represent" those who elect them, but, nevertheless, refusing to apply its established meaning to Congress' use of the term "representatives" in Section 2 of the Voting Rights Act).

[10] 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973) (Justice White, joined by Justices Douglas and Marshall, dissenting).

347 F. Supp., at 455-56 (quoting from Buchanan v. Rhodes, 249 F. Supp. 860 and New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148). It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming Wells, did not concur in that reasoning. If there were doubt, however, it would be laid to rest by the terms of the dissent, which attacks the district court opinion in stern, egalitarian terms for having, like other opinions cited by it, held "that the one-person, one-vote principle does not apply to the judiciary." 409 U.S. 1095, 1096 n.2. Nor is it likely, we think, that the Supreme Court would hold, as it necessarily did in affirming Wells v. Edwards, that although for purposes of the Equal Protection Clause of the Fourteenth Amendment judges "do not represent people," all the same, for purposes of Section 2(b) of the Voting Rights Act, judges are "representatives of [the people's]

choice." Both must be true, or neither one.[11]

Wells is not only instructive as to the meaning of "representatives" and thus as to the scope of Section 2, it is dispositive of the precise issue of the scope of Section 2's applicability raised in this case. The Wells holding -- that the one-person, one-vote rule does not apply to the judiciary -- leads inexorably to the conclusion that judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members. Absent the one-person, one-vote rule -- that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless

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[11] It is interesting to note that the dissent from the panel opinion, in the very course of complaining of the majority's refusal to apply Section 2 to trial judges, candidly recognizes that judges, unlike legislative and executive officers, "represent" no one:

> When weighing a state's claim that it has a compelling interest in retaining the existing at-large system, courts should keep in mind the common sense notion that the role of judges differs from that of legislative and executive officials. Since it is not the role of judges to "represent" their constituents an examination of the "responsiveness" of the elected official to minority concerns is clearly irrelevant.

902 F.2d at 317 n.17.

of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside -- there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the nonexistent wrong complained of here.

The notion of individual vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), was the foundation for the concept of minority vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124 (1971)[12], White v. Regester, supra, and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote -- the guarantee of substantial equality among individual voters. With that guarantee in mind,

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[12] In Whitcomb v. Chavis the Supreme Court directly considered a racial dilution challenge and rejected the claim that the Indiana legislative reapportionment plan operated to minimize or cancel out minority voting strength. The Court held that the mere fact that ghetto residents were not proportionately represented did not prove a consitutional violation unless they were denied equal access to the political process.

remedial schemes to combat minority vote dilution were devised on a case by case basis.

Almost twenty years ago, we articulated the conceptual link between individual vote dilution and minority vote dilution, making clear the latter's dependence on the former:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.

Zimmer, 485 F.2d at 1303 (emphasis added).

For it is the assumption of substantial equality (achieved through the guarantee of one-person, one-vote) that underlies the concept of minority vote dilution. This assumption, the Court held in Wells, does not obtain in judicial elections; and without that assumption there exists no yardstick by which to measure either the "correct" magnitude of minority voting strength or the degree of minority vote dilution. Thus, on a conceptual level, and to paraphrase Justice

Harlan, we are asked to undertake the ineffable task of equalizing that which we cannot measure. Whitcomb, 403 U.S. at 169 (Harlan, J., separate opinion).

We are therefore unable to take the crucial step from individual vote dilution to minority vote dilution in this case, not only because the holding in Wells forbids us to assume the existence of "substantial equality," but because it compels us to recognize that no such equality need exist in the arena of judicial elections. The bridge between the two concepts, fashioned by the Court in Reynolds v. Sims and applied there to state legislatures, is of limited length and, as the Court made clear by affirming Wells v. Edwards, does not extend to the judiciary.

Finally, as the district court stated in Wells:

> The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents.

Wells, 347 F. Supp. at 455.

We reiterate that judges do not represent people and, thus, have no constituents. Judges speak the voice of the law. In doing so they speak for and to the entire community, never for segments of it and still less for particular individuals. To describe the judge's office merely as "not a representative one" is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge does represent anyone, he is not a judge but a partisan.

New Subsection 2(b)

So the land lay when Congress enacted Section 2(b) in 1982, choosing to replace the term "legislator" in the White phraseology with the term "representative" -- a term which is employed only at this spot and appears nowhere else in the entire Voting Rights Act. By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which

the judicial office was not deemed a "representative" one. Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987). Against this background, then, the Congress deliberately picked a term of art for use in amending Section 2 that up to that time had been universally held, and which it knew had been universally held by every federal court that had considered it as of that date, neither to include judges nor to comprise judicial offices. In view of these circumstances, we find it all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to elections for representative, political offices but not to vote dilution claims in judicial contests, leaving the latter to be regulated and controlled by state law, by the Constitution, or by other provisions of the Voting Rights Act.[13] Given the

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[13] Indeed, as the panel opinion correctly notes, many states of the Union over the course of their history have maintained an appointive judiciary, and some do so today. 902 F.2d, at 296. Given the fact, also noted there, that none of the original thirteen states elected its judiciary, an appointive system must be viewed as consistent with the "Republican Form of Government" guaranteed the States by Article 4, Section 4, of the Constitution.

mutual exclusiveness of the two terms, to suggest that Congress chose "representatives" with the intent of including judges is roughly on a par with suggesting that the term night may, in a given circumstance, properly be read to include day.

We are further persuaded by the knowledge that in amending Section 2 Congress was well aware of the genesis of the concept of minority vote dilution. The legislative history makes clear that Congress knew that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of Reynolds v. Sims." S. Rep. No. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code

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In view of this, and while it is certainly possible to imagine Congress's taking the position that, while states need not elect judges, if they do so they must do so on exactly the same terms as they elect representatives, the view which it adopted seems at least equally cogent: that since the office of the judge is not to represent the popular will, and since judges are not expected to initiate significant departures in law or policy, the states need not be subjected in their selection or election to so severe and intrusive a provision as one applying a "results" test to claims of minority vote dilution.

Cong. & Admin. News at 196. Given its awareness of the Wells v. Edwards holding -- that the one-person, one vote rule does not apply to the judiciary -- we must conclude that Congress, aware of the combined effect of Reynolds and Wells, limited the scope of amended Section 2 so as to rule out the judicial branch, an area within which the issue of the viability of minority vote dilution claims had been well settled.

Countervailing Arguments

Thus we find on one side of the argument whether Section 2(b)'s results test for elections applies to judicial ones the Congress's carefully chosen term of art -- "representatives" -- deliberately selected by Congress and placed in the section itself, with a settled legal meaning excluding judges. On the other side are ranged contentions of a more attenuated and derivative nature, which we now consider briefly.

First we are told that the definition of "voting," included in the original act as Section 14(c)(1) and now codified as 42 U.S.C. 1973(1)(c)(1), refers to "candidates for public or party office" and that, since judicial hopefuls are included within the generality of such a reference to candidates, the results test which applies to all others must be applied to them as well. The specific controls the general here, however, as in any other instance of statutory construction; and we see little force in the claim that an inference from a general term buried in a definitional section far from Section 2 should control the specific and supervening language inserted by Congress in the section itself. Nor is there any necessary conflict between the two provisions: as we have noted, it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections, as may the results test to claims other than those of vote

dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in any electoral aspect.

The same answer also refutes the next argument: that because, as was held in Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd mem., 477 U.S. 901 (1986), Section 5 of the Act applies to state judicial elections, Section 2 must apply as well. As we have explained, portions of Section 2 may well apply -- except for the results test introduced in response to the holding in Bolden to govern vote dilution in the election of "representatives," which by its own terms does not.

Next we are told, in yet another general argument similar to those we have just rejected, that we must apply the dilution results test to judicial elections because the 1982 amendments to Section 2 were intended to expand, rather than to restrict, the section's coverage. Doubtless they were generally so intended; doubtless they did so; but the

presence of a general intent to expand coverage requires neither an expansion at all points nor the maximum imaginable expansion at any and is not even necessarily at odds with a specific intent to restrict coverage at one or another of them. Section 2 was greatly expanded, expanded to add a results test to the intent test of the Fourteenth and Fifteenth Amendments -- expanded in most respects, but not in all.

Finally, in a scatter of birdshot contentions, counsel point to the broad construction that the Attorney General has historically accorded the Voting Rights Act, to the absence in the Act's legislative history of any explicit statement that judicial elections are not covered, to the presence in that history of references to statistics on minority performance in various elections (including judicial ones), and to a single reference to "judicial districts" in a cautionary parade of horribles to be found in a subcommittee report hostile to the proposed 1982 amendments. None of these seems to us to

weigh very heavily in the scales against the specific terminology of Section 2 itself.[14] In the words of Justice Frankfurter, writing for a unanimous court in Greenwood v. United States, it appears to us that "this is a care for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." 350 U.S. 366, 374 (1955).

It is, and we do so.

Conclusion

In no area should federal courts tread more cautiously than where it is contended that Congress has imposed

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[14] Thus, as Justice Scalia has very recently suggested, we "appl[y] to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point . . . ." Begier v. United States, ___ U.S. ____, ____; 110 L.Ed.2d 46, 63 (1990) (concurrence in judgment).

And these small matters are indeed scourings. The panel opinion avers, 902 F.2d at 299, and we do not doubt, that the reference to "judicial districts" is the sole reference to the judiciary in all the legislative history of the 1982 amendments of the Act. It will be noted that even this reference is one to judicial districts, not to judicial candidates; and in our Circuit many officials such as sheriffs, highway commissioners, district attorneys and clerks of court, who are "representatives" and not judges, are elected from judicial districts, e.g., Miss. Code Ann. (1972) 65-1-3.

incremental Federal power on the States; and the nearer to the core of traditional state authority and concern we are asked to venture, the more warily we should tread. The point is elegantly made by the panel opinion in this very case:

> Few would quarrel with the assertion that Section 2(b) as interpreted has worked a fundamental change in the Act, highly intrusive to the states. We have insisted in other contexts that Congress clearly state its intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984) (Pennhurst II). This insistence upon an "unequivocal expression of congressional intent," Pennhurst II, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake. "The 'constitutionally mandated balance of power' between the states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Atascadero, 105 S.Ct. at 3147 (quoting Garcia v. San Antonio Metropolitan Transport Authority, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028 (1985) (Powell, J., dissenting)).

LULAC, 902 F.2d at 301.

It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed. Instead, as regards the issue in this case, our investigation reveals an all but total absence of relevant legislative history and a statutory text that unambiguously excludes elections of non-representative state officers from Section 2's highly intrusive results test. If this was not the intended effect of Congress's substitution of representatives for legislators in Justice White's language, no other suggests itself; and we must reject any notion that Congress went to all the trouble of selecting that language and carefully modifying it, just so far and no further, randomly and with nothing particular in mind.[16][sic] It is

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[16] Both the dissent and, more obliquely, the special concurrence take our writing to task as resting on the narrow foundation of one word. In main, this is true; for the substitution of the term "representative" is all but the sole clue to be found -- in either the statutory text or the

never proper for us to extend a statute's force by construction into areas where Congress has not seen fit or has been unable to agree to go, and never less proper than in such supremely sensitive territory as this.

Judicial offices and judicial selection processes are sui generis in our nation's political system; they determine the referees in our majoritarian political game. These offices are not "representative" ones, and their occupants are not representatives. Indeed, the state processes for filling them need not even be elective, as those for all representative offices presumably must be. See U.S. Const., Art. 4, Sec. 4. In 1982, when Congress determined to expand Section 2 of the Act to incorporate a results test for vote dilution, it

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legislative history -- to guide the interpreter in unraveling the legislative intent behind this enigmatic statute. Dim or no, it is the only light available to guide our footsteps, and we have followed it as best we could.

By contrast, our specially concurring and dissenting brethren proceed by ignoring the sole guide available, first declaring that the only light that shines is of no help, then proceeding in total darkness and, so proceeding, to declare that the statute means, not what it says, but what they think Congress should have said -- pausing briefly in passing to accuse our majority of doing what they in fact have done themselves.

stopped short of imposing such a test for judicial offices on the States by limiting it to their election of "representatives." Should Congress seek to install such a test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary. Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) is overruled.

REVERSED.

[The opinions of Chief Judge Clark and Judge Higginbotham concurring in the result and the dissenting opinion of Judge Johnson have been omitted from this Appendix; they can be found at 914 F.2d 620.]

(2)

No. 90-757

Supreme Court, U.S.
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DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARC MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Petitioners,

versus

BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

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STATEMENT OF THE CASE

Petitioners brought this suit in the United States District Court for the Eastern District of Louisiana on behalf of all black registered voters in Orleans Parish, approximately 135,000 people. The suit challenged the at-large election of two Justices to the Louisiana Supreme Court from the parishes of Orleans, St. Bernard, Plaquemines and Jefferson (the First Supreme Court District) as being in violation of the 1965 Voting Rights Act, as amended, because of alleged dilution of the voting strength of the Petitioners. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 1973. The action sought declaratory and injunctive relief, 42 U.S.C. §§ 1973 and 1983. Petitioners also sought relief under 28 U.S.C. §§ 2201 and 2202 and the Fourteenth and Fifteenth Amendments to the United States Constitution. Petitioners sought the division of the First Supreme Court District into two districts, one to be comprised of the parishes of Jefferson, Plaquemines and St. Bernard and the other of Orleans Parish where blacks constituted a majority of the registered voters.

A. The First Supreme Court District in Louisiana.

The Louisiana Supreme Court is the highest court in the State of Louisiana. The Court is composed of seven Justices, elected from six Supreme Court districts for a term of ten years. *Chisom v. Roemer*, ___ F. Supp. ___, Slip Opinion 3 (E.D. La. 1989) (hereinafter cited as *"Slip Op. #"*). No parish lines are cut by any of the election districts for the Supreme Court. *Slip Op.* 4.

The First Supreme Court District, consisting of the city of New Orleans and its surrounding environs,[1] has been the only district that has elected two Justices since adoption of the 1879 Louisiana Constitution more than 110 years ago. *Slip Op.* 16; *see* Louisiana 1879 Constitution Article 82; Louisiana 1898 Constitution Article 87; Louisiana 1913 Constitution Article 87; Louisiana 1921 Constitution Article 7, § 9; and Louisiana 1974 Constitution Article 5, § 4.

The most recent Louisiana Constitution took effect in 1974 after the 1973 Louisiana Constitutional Convention. Twelve of the 132 delegates to the Convention were black. *Slip Op.* 17. During the Convention three amendments were proposed to divide the Supreme Court into single-member districts. The first failed 27-85, with one black delegate voting for the proposal, eleven [sic – should be ten] against, and one absent. *Slip Op.* 18. The second failed 47-67, with seven blacks voting for the amendment, four against, and one absent. *Slip Op.* 18. The final amendment proposed splitting the First Supreme Court District into two districts, with one Justice to be elected from each. When a white delegate argued in favor of the proposal, a black delegate from Orleans Parish responded that the present arrangement should not be changed. *Slip Op.* 19. This amendment was defeated 50-63, with five blacks voting for the amendment and seven against. *Slip Op.* 19. The final districting plan, leaving the First Supreme Court District with two Justices, was adopted 103-9, with eight blacks voting for the plan, one against,

[1] The parishes in the First Supreme Court District include Orleans, St. Bernard, Plaquemines, and Jefferson Parishes.

and two absent. *Slip Op.* 19. Four of the blacks voting for the plan were delegates from Orleans Parish.

The proposed Constitution was approved by the United States Department of Justice and ratified by the voters of Louisiana on April 20th, 1974. *Slip Op.* 19. Although the Louisiana Legislature has the authority to change districts and the number of Justices by a two-thirds vote, 1974 Louisiana Constitution Article 5, § 4, it has never done so. *Slip Op.* 19. A proposed constitutional amendment to split the district so that Orleans Parish would constitute a district by itself was defeated by the Louisiana voters in October, 1989 with the unofficial Associated Press totals showing a vote of 151,342 for the amendment and 451,845 against the amendment. *Baton Rouge State-Times*, October 9th, 1989. In Orleans Parish the amendment was defeated by a three-to-one majority, with 16,526 voting for the amendment and 46,354 voting against the amendment. *New Orleans Times-Picayune*, October 8th, 1989.[2]

B. Prior Proceedings in this Litigation.

After the complaint was filed, respondents filed a Fed.R.Civ.P.12(b)(6) motion to dismiss for the failure of the petitioners to state a claim upon which relief could be

[2] Given that Orleans Parish is majority black in both population (55.2%) and registered voters (53.6%), and given that the amendment was defeated three to one in Orleans Parish, it is fair to surmise that blacks in Orleans Parish opposed the amendment which would bring about the very same remedy sought by petitioners herein.

granted. The district court agreed with respondents' contention that it was not the intention of Congress to apply the word "representatives" in Section 2 of the Voting Rights Act, as amended, to embrace members of the judiciary. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987). The district court drew a distinction between the impartial functions performed by the judiciary without a constituency and the functions performed by representatives who are not expected to be impartial but rather reflective of the needs and wishes of their constituency. 659 F. Supp. at 186.

The petitioners appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the district court and remanded the case because the Court concluded that Section 2 does apply to the election of state court judges. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *rehearing and rehearing en banc denied, cert. denied sub nom. Roemer v. Chisom*, 488 U.S. 955, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988).

The petitioners then successfully moved to enjoin the election of a Justice from the First Supreme Court District during the regularly scheduled Fall, 1988 election. *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. 1988). The Fifth Circuit stayed the injunction, 850 F.2d 1051 (5th Cir. 1988), and ultimately reversed the injunction, 853 F.2d 1186 (5th Cir. 1988).

After a trial on the merits, the district court dismissed petitioners' statutory and constitutional claims. *Chisom v. Roemer*, ___ F. Supp. ___ (E.D. La. 1989). The court concluded:

> that the petitioners had not proven that the use of a multi-member electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. As detailed in the court's findings of fact, the statistical evidence regarding judicial and non-judicial elections shows that the blacks have had full access to the political process and routinely elect their preferred candidates, often times joining forces with a significant portion of the white electorate, and thereby creating significant crossover voting.

Slip Op. at 40-41. The petitioners appealed the Voting Rights Act decision.[3] The Fifth Circuit remanded for dismissal for failure to state a claim upon which relief may be granted. 917 F.2d 187 (5th Cir. 1990). On remand the case was dismissed. ___ F. Supp. ___ (E.D. La. 1990). Thereafter, this Petition was filed.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT SECTION 2(b) OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE JUDICIARY.

A. The LULAC Decision.

The United States Court of Appeals for the Fifth Circuit dismissed the appeal in this case based on the *en banc* decision of that Court in *Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en

[3] Petitioners did not appeal the district court's rejection of their constitutional claim of intentional discrimination.

banc) (hereinafter *"LULAC"*).[4] The plaintiffs in *LULAC* challenged the county-wide, at-large election of trial judges in Texas as violative of § 2(b) of the Voting Rights Act and of the United States Constitution. The trial court denied the constitutional claims, finding that the requisite discriminatory intent had not been proven. 914 F.2d at 623. The trial court, however, did find "that the Texas law produced an *unintended* dilution of minority voting strength" in violation of the "results" test of § 2(b) of the Voting Rights Act. 914 F.2d at 623 (emphasis in original). On appeal, a panel of the Fifth Circuit held that § 2(b) did not apply to trial judges because they are single-member officeholders who can be elected only at-large. 902 F.2d 293 (5th Cir. 1990).

The Fifth Circuit granted an *en banc* hearing *sua sponte*. A majority held that judges are not "representatives" within the meaning of § 2(b) of the Voting Rights Act and that the "results" test of § 2(b) does not apply to the judiciary. 914 F.2d 620 (5th Cir. 1990). Five judges concurred, agreeing with the view of the panel that trial judges are single-member officeholders. 914 F.2d at 634. Chief Judge Clark also concurred, limiting the case to its facts. 914 F.2d at 631. Only one Judge, Judge Sam Johnson, dissented. 914 F.2d at 651. After the *en banc* opinion was published, the panel in *Chisom* remanded this case to

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[4] On November 21, 1990, a group of plaintiffs-intervenors in that case, the Houston Lawyers' Association and six individuals, filed a petition for a writ of certiorari asking this Court to review the judgment and opinion of the Fifth Circuit in *LULAC*. That petition is pending.

the district judge with orders to dismiss all Voting Rights Act claims. 917 F.2d 187 (5th Cir. 1990).

B. The Genesis of § 2(b) of the Voting Rights Act.

Section 2 of the Voting Rights Act of 1965 forbade imposition or application of any "voting qualification or prerequisite to voting, or standard, practice, or procedure" to prevent any citizen from voting on account of race or color. 42 U.S.C. § 1973. This Court in *City of Mobile v Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), held that enforcement of § 2 required proof of racially-discriminatory intent.

Congress then passed the Voting Rights Act of 1982 amending § 2 to

> restore the "results test" – the legal standard that governed voting discrimination cases prior to [the Supreme Court's] decision in *Mobile v. Bolden* * * * * Under the "results test," plaintiffs are not required to demonstrate the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 43 n. 8, 106 S.Ct. 2752, 92 L.Ed.2d 25, 42 n. 8 (1986) (citations omitted). In writing § 2(b), Congress chose – with one significant exception – the words of Justice White in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Justice White stated that plaintiffs' burden of proof was to show:

> that its members had less opportunity than did other residents in the district to participate in the political processes and to elect *legislators* of their choice.

412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324 (emphasis supplied). Section 2(b) provides that a plaintiff class of citizens must show:

> that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.

42 U.S.C. § 1973(b) (emphasis supplied). As the majority in *LULAC* recognized, the choice of the word "representatives" was a deliberate one: "the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning." 914 F.2d at 625.

C. This Court has always held that Judges are not "representatives."

As stated in the prior section, § 2(b) applies to "representatives." Members of the legislative and executive branches are certainly representatives, and the case law is replete with decisions holding that § 2(b) applies to such entities. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989) (city council and mayor); *Edge v. Sumter County School District*, 775 F.2d 1509 (11th Cir. 1985) (school board); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) (city aldermen); *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984) (county commission); *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) (city council); *Brown v. Board of School Commissioners of Mobile County*, 706 F.2d 1103 (11th Cir.), *affirmed*, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 705 (1983) (board of school commissioners); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *affirmed*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984) (congressmen).

Judges, however, traditionally have not been considered "representatives." This Court so held by affirming a three judge court voting rights decision that the "one-man, one-vote" concept does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In refusing to apply "one-man, one vote" precepts, the three judge court reasoned as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)]:
>
> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 153.

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three judge court). The *LULAC* majority opinion reasons that "[i]t is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning." 914 F.2d at 627.

Similarly, Justice Frankfurter has stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 575, 71 S.Ct. 857, 95 L.Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in the judgment). And Justice Stewart has contrasted the Court's duty with that of the people's representatives:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31, 85 S.Ct. 1678, 14 L.Ed.2d 510, 542 (1965) (Stewart, J., dissenting) (emphasis supplied).

D. Other Federal Courts have held that Judges are not "representatives."

The lower federal courts have also held that judges are not representatives. The plaintiffs in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three judge court), attacked the North Carolina system of nominating judges by districts and electing them statewide, contending that it denied voters equal protection of the laws. They cited, *inter alia*, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The court distinguished these and the other cases because they "dealt with the election of the representatives of the people –

officials who make laws, levy and collect taxes, and generally manage and govern people." 335 F. Supp. at 930. After discussing two precedents involving reapportionment, the court stated:

> While *Buchanan [v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)] and [*New York State Association of Trial Lawyers v.] Rockefeller* [267 F. Supp. 148 (S.D.N.Y. 1967], deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

335 F. Supp. at 932. The *Holshouser* case was affirmed by the Supreme Court. 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972).

A similar system of electing judges in Georgia was upheld in *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) (three judge court). The court stated:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no

> way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

234 F. Supp. at 577.

In two New York cases the plaintiffs sought judicial reapportionment on the basis of population, again relying on legislative reapportionment cases such as *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967), the court rejected the comparison, stating that:

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> * * * *
>
> In contrast to legislative apportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

267 F. Supp. at 153-54. A three judge court rejected a similar suit in the Eastern District of New York, quoting the *Rockefeller* opinion's statement that the state judiciary

is not "responsible for achieving representative government." *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three judge court).

The Ohio judicial structure guaranteeing each county at least one judge in the court of general jurisdiction came under attack in *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 89 S.Ct. 118, 21 L.Ed.2d 110 (1968). Once again, the complaint was predicated upon the Supreme Court's reapportionment cases. The court noted that when representatives to a legislative body are malapportioned, the voting strength of individual citizens becomes unequal, causing a dilution of power. 249 F. Supp. at 865. Judges, however, are not governed by such a rule:

> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people.

249 F. Supp. at 865.[5]

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[5] Numerous other decisions make a similar distinction between judges and representative officials. *See Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of one-man, one-vote to judicial selection in Ohio and holding "that equal protection does not require the

(Continued on following page)

E. The Term "representatives" is not a Synonym for "elected officials".

Earlier sections of this Response demonstrate that this Court and the lower federal courts do not consider judges to be "representatives." This section argues that the word "representative" as used in § 2(b) is not synonymous with "elected official" and should instead be given its commonly understood meaning. This Court has laid down definitive guidelines for construing language which appears in Congressional acts.

In *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980), the Court stated:

(Continued from previous page)

allocation of state judges on this basis"); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n. 6 (D.R.I. 1975) (holding one-man, one-vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (three judge court) (rejecting application of one-man, one-vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary").

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

447 U.S. at 108, 100 S.Ct. 2051, 64 L.Ed.2d at 773.

Four years later, in furtherance of this concept of construction, the Court held in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984):

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that " '[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.' "

466 U.S. at 772, 104 S.Ct. 2105, 80 L.Ed.2d at 761 (citations omitted).

And in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court said:

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language * * * * If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is " 'a clearly expressed legislative intent to the contrary.' "

460 U.S. at 110, 103 S.Ct. 986, 74 L.Ed.2d at 853 (citations omitted).

The term "representatives" refers to those who serve a specialized constituency and whose role is to represent the needs and interests of that constituency. The term "representatives" has never been commonly accepted as including the judicial branch; indeed, the reverse is true –

namely, the judicial branch always has been treated as separate and distinct from the two representative arms of government.

A representative of a district, be it federal, state, or local, exists to serve and favor his or her constituency, while hopefully also working for the good of the governmental jurisdiction as a whole. United States representatives are expected to help obtain government contracts for their districts; no one, however, would expect a federal judge to uphold such a contract citing as a reason the need of his area for governmental business. State legislators are expected to seek bridges and roads for their districts; no one, however, would expect a state judge to mandate that such bridges and roads be built merely because the people want them. City councilmen are expected to promote drainage projects for their council district; no one, however, would expect a city judge to require them to keep his voters happy.

Judges thus are not representatives; further, they should not be representatives. The larger the constituency, the less parochial pressures can be brought to bear. An advantage to at-large elections for judges is that judges can make the difficult decisions without undue fear of dissatisfaction in the electorate. A judge would be much less likely to vote against the residents of a neighborhood on a zoning issue if that judge was elected solely by that neighborhood. Justice ought to be identical throughout a judicial system; electing judges from neighborhoods, however, might make for a system of individualized justice currently foreign to the United States. Admittedly, many problems could be cured on appeal; however, it can be extremely difficult to reverse a detailed record of fact-finding even when the facts have been slanted. Further, the petitioners here seek to make appellate

districts smaller also, again lessening the number and mix of a judge's electorate.

Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "elected official" for the term "representative"; it did not do so. In a representative form of government, such as ours, it is always true that a "representative" is an "elected official"; however, the converse is *not* always true.

Representatives have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity and from many of whom they are likely, sooner or later, to receive correspondence or a telephone call or even perhaps a personal visit. Judges have but one constituency, the blindfolded lady with the scales and sword.

F. The Fundamental Difference Between "representatives" and Members of the Judiciary is Deeply Rooted in this Country's History.

In holding that "the judiciary serves no representative function whatsoever," 914 F.2d at 625, the *LULAC* Court quoted Professor Eugene Hickok as stating that, "The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive." Hickok, "Judicial Selection: The Political Roots of Advice and Consent" in *Judicial Selection: Merit, Ideology and Politics* 5 (National Legal Center for the Public Interest 1990), *quoted at* 914 F.2d at 926.

Other scholars have also recognized this difference. Professor G. Edward White has written in *The American Judicial Tradition* that the American judicial tradition emerged with

Chief Justice John Marshall.[6] A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White summarized Chief Justice Marshall's views concerning the judiciary as follows:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence was not merely a side effect of federalism but a first principle of American civilization * * * * Against the potential chaos attendant on mass participatory democracy, republicanism erected the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Chief Justice Marshall's vision of the American judicial tradition was not unique. Alexander Hamilton "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the democratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some of the Founding Fathers

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[6] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has also been applicable to the state judiciary. Professor White commented that the state constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Much more recently, Chief Justice Roger Traynor of the California Supreme Court wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, quoting Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L.Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. Legislatures, on the other hand, "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' " *Judicial Tradition* 322. One Twentieth Century Justice, Felix Frankfurter, has called the judiciary

the "antidemocratic, unrepresentative" branch of government." *Judicial Tradition* 367.[7]

Various legal theorists have also stated that judges are not "representatives." Perhaps the most provocative book to appear on judicial review during the last few years is *Democracy and Distrust* by Professor John Hart Ely.[8] Professor Ely contrasts the role of the courts with the role of the representative branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. In his book, Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch (the judiciary) would review legislation to determine the motivation of the representative branch (the legislature) to make sure that the views of all groups were represented in lawmaking. He concluded by stating that "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

Professor Alexander Bickel spoke of the importance of judicial independence in *The Supreme Court and the Idea of Progress*.[9]

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[7] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in both federal and state governmental systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[8] Page references are to the 1980 Harvard University Press hardbound edition.

[9] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears – dogmatic, arbitrary, irrational, self-or group-centered, – that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought, even of those who find a result disagreeable. The judge is thus buttressed against the world, but what is perhaps more significant and certain, against himself, against his own natural tendency to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming.
>
> * * * *
>
> The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court with the people and its representatives, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.[10]

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[10] *Supreme Court and Progress* also contains much material on reapportionment. *Supreme Court and Progress* 35, 158-59,

(Continued on following page)

II. IF THE ONE-MAN, ONE-VOTE REQUIREMENT DOES NOT APPLY TO THE JUDICIARY, THE CONCEPT OF MINORITY VOTE DILUTION SET FORTH IN § 2(B) DOES NOT APPLY TO THE JUDICIARY.

This Court has held that the one-man, one-vote requirement does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.E.2d 679 (1973). If this requirement is inapplicable, the concept of minority vote dilution in at-large districts is similarly inapplicable to the judiciary. As the Fifth Circuit held in *LULAC*,

> Absent the one-person, one-vote rule – that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside – there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.
>
> The notion of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), White v. Regester, [412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)], and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of

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168-73. Never in that discussion is there any intimation that reapportionment requires judicial redistricting. Indeed, such a notion would run counter to his strong arguments for judicial independence.

> one-person, one-vote – the guarantee of substantial equality among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

914 F.2d at 627 (emphasis in original). The Senate Report concerning the 1982 amendment to the Voting Rights Act states "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S.Rep.No. 417, 97th Cong. 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196.

The key issue, therefore, is whether Section 2(b) of the Voting Rights Act enshrines the "one-man, one-vote" principle as the touchstone test. If it does, then it cannot be used to analyze judicial elections, because the "one-man, one-vote" test was expressly rejected as applying to the judiciary in *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *affirmed* 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973).

The express language of the plurality opinion in *Gingles*, bolstered by the language of the concurring opinions, shows that Section 2(b) is solely a "one-man, one-vote" litmus test. Justice Brennan, in speaking for the plurality, began by noting that when Section 2 of the Voting Rights Act was amended in 1982 to add Section 2(b), the Congressional revision was a response to the plurality opinion in *Mobile v. Bolden*, 478 U.S. at 35, 106 S.Ct. at 2759, 92 L.Ed.2d at 37. The plurality in *Gingles*, in interpreting what evidence it takes under Section 2(b) to prove a Section 2(a) violation, established a three-fold test:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, – in the absence of special circumstances, such as a minority candidate running unopposed * * * usually to defeat the minority's preferred candidate * * * * In establishing this last circumstance, the minority group demonstrates that the submergence in a white multi-member district impedes its ability to elect its chosen representatives.

478 U.S. at 50-51, 106 S.Ct. at 2766-67, 92 L.Ed.2d 46-47.

As Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger recognized in their concurring opinion in *Gingles*, this three-fold test equates to a requirement of proportional representation; i.e., one-man, one-vote. Justice O'Connor, speaking for these Justices, stated:

> Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.

478 U.S. at 85, 106 S.Ct. at 2784-2785, 92 L.Ed.2d at 69.

> In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2.

478 U.S. at 94, 106 S.Ct. at 2789, 92 L.Ed.2d at 74.

> The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough, proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of the single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multi-member district school, *it follows that the Court is requiring a form of proportional representation*.

478 U.S. at 97, 106 S.Ct. at 279, 92 L.Ed.2d at 76-77 (emphasis supplied).

Justice O'Connor, and the other Justices who joined in her concurring opinion, recognized that proportional representation (one-man, one-vote) is the result of the plurality's opinion. It was exactly this type of proportional representation that the plurality in *Mobile v. Bolden* had *rejected* in its analysis of both Section 2 (pre-1982 amendments) and the Fourteenth and Fifteenth Amendments:

> The theory of [Justice Marshall's] dissenting opinion – a theory much more extreme than that espoused by the District Court or the Court of Appeals – appears to be that every "political group," or at least every such group that is a minority, has a federal constitutional right to elect candidates in proportion to its numbers. * * *

> Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law.

446 U.S. at 75, 100 S.Ct. at 1504, 64 L.Ed.2d at 63-64.

The plurality in *Mobile* recognized that what is now Section 2(a) does not require a "proportionality" test. Section 2(a) was not substantially changed in the 1982 amendments. Thus, if Section 2(b) establishes a "one-man, one-vote" test, then under *Wells* it cannot be used against the judiciary.

The petitioners may take the position that there is a distinction between a "proportionality" test and a "one-man, one-vote" test. Such an argument would be unavailing, as the plurality opinion in *Mobile v. Bolden* expressly recognized.

After discussing (and rejecting) the dissent's argument concerning proportionality, the plurality in *Mobile* went further and determined that the "proportionality" argument equated to a "one-man, one-vote" test.

> The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds v. Sims, supra*, [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)] and its progeny.

446 U.S. at 77, 100 S.Ct. at 1505, 64 L.Ed.2d at 65. As *Mobile v. Bolden* recognized, the term "vote dilution" is equivalent to holding that there is a "one-man, one-vote" test. 446 U.S. at 78, 100 S.Ct. at 1505, 64 L.Ed.2d at 65-66. As the plurality in *Mobile v. Bolden* stated:

> There can be, of course, no claim that the "one-person, one-vote" principle has been violated in this case * * * it is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.

* * *

> It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of a significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

446 U.S. at 78, 100 S.Ct. 1505, 1507, 64 L.Ed.2d at 65, 66.

Because *Gingles* involves only the interpretation of Section 2(b), and because *Wells* prohibits the use of a "one-man, one-vote" test involving judicial elections, it is clear that the Section 2(b) results test cannot be used to prove a violation of Section 2(a) in judicial elections.

The concept of dilution of group voting strength [which is embodied in subsection (b) of amended Section 2] rests on two assumptions: (1) that each person's vote should have the same weight as another person's vote, and (2) that a given (protected) group should wield roughly the aggregate voting strength of its members. *See Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973). If the first assumption is not true, the second cannot be made. For *without* the assumption of substantial equality among voting shares made possible by the one-man, one-vote principle, no aggregate measure of minority voting strength – and therefore no measure of dilution of that strength – is conceivable. Because the one-man, one-vote rule does *not* apply to the judiciary, the conceptually dependent notion of minority group vote dilution, embodied in subsection (b), has no field of operation in judicial elections.

This argument has nothing to do with statutory interpretation, does not depend on a particular construction of the word "representative" as used in subsection (b), and

is not based on whether Congress intended that amended Section 2 have some field of operation with respect to judicial elections. It is, instead, based on an explanation of why, regardless of what breadth Congress intended for amended Section 2, minority group vote dilution – as that concept has developed in the voting rights jurisprudence – simply cannot exist unless the one-man, one-vote rule applies.

Thornburg v. Gingles, the Court's definitive exegesis of Section 2 vote dilution, sharpens this point. In her concurring opinion, Justice O'Connor, joined by Powell, Rehnquist, and Chief Justice Burger, notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Gingles*, 478 U.S. at 88, 106 S.Ct. 2786, 92 L.Ed.2d at 71. There is no doubt that the yardstick adopted by the *Gingles* Court – a calculation of the minority's potential voting strength in a single-member district system – rests on the assumption that the one-man, one-vote rule applies and that each district has roughly the same population. *See* 478 U.S. at 50-51 n. 17, 89-90, 106 S.Ct. 2766-67 n. 17, 2787, 92 L.Ed.2d at 46-47 n.17, 72. Otherwise, to paraphrase Justice Harlan, the Court would be unable even to measure what it purports to equalize. *Whitcomb v. Chavis*, 403 U.S. at 169, 91 S.Ct. 1883, 29 L.Ed.2d at 391 (Harlan J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one-man, one-vote rule, *Gingles'* first prong is meaningless in the judicial

context. It is always possible to construct a geographically compact black voting majority district by continuing to reduce the total population in that district down to, if necessary, a minimum of one. There ARE no "judicially discernable and manageable standards" by which a court could find that a given judicial election system does *not* dilute minority voting strength if the population size of the hypothetical single-member subdistrict can be contracted or expanded at will. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663, 686 (1962). As one lower court has held, "An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

CONCLUSION

This Court has always recognized the importance of an independent judiciary, holding in *Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970): "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." 398 U.S. at 84, 90 S.Ct. 1648, 26 L.Ed.2d at 108. In a dissent in the same case, Justice Douglas stated, "An independent judiciary is one of this Nation's outstanding characteristics." 398 U.S. at 136, 90 S.Ct. 1648, 26 L.Ed.2d at 137 (Douglas, J., dissenting).

A quarter of a century ago this Court declared, "Legislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506, 527 (1964). Unlike legislators, judges are not "instruments of government elected directly by and directly representative of the people." 377 U.S. at 562, 84 S.Ct. 1362, 12

L.Ed.2d at 527. Making judges representatives would do violence to (and perhaps destroy) the American concept of an independent judiciary.

For the reasons set forth herein, this Court should deny the Petition for Certiorari.

All of the above and foregoing is thus respectfully submitted.

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OCTOBER TERM, 1990

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the courts below: Marie Bookman; Walter Willard; Marc Morial; Henry Dillon III; the Louisiana Voter Registration/Education Crusade; Edwin Edwards, in his capacity as Governor of the State of Louisiana; James H. Brown and W. Fox McKeithen, in their capacities as Secretaries of State of the State of Louisiana; Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana; Pascal F. Calogero, Jr.; and Walter F. Marcus, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-757

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

No. 90-1032

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (90-757 Pet. App. 1a-3a) [1] is reported at 917 F.2d 187. The opinion of the district court (excerpted at Pet. App. 4a-

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[1] The petition appendix in No. 90-757 contains the materials required by this Court's Rule 14.1(k). Unless otherwise noted, we will hereafter use the term "Pet. App." to refer to the petition appendix in No. 90-757.

64a) is unreported. An earlier opinion of the court of appeals (J.A. 26-44) is reported at 839 F.2d 1056. An earlier opinion of the district court (J.A. 12-25) on the merits is reported at 659 F. Supp. 183. An earlier opinion of the district court on a stay motion is reported at 690 F. Supp. 1524. Earlier opinions of the court of appeals on a stay motion are reported at 850 F.2d 1051 and 853 F.2d 1186.

The panel opinion of the court of appeals in the related case of *League of United Latin American Citizens Council No. 4434* v. *Clements* is reported at 902 F.2d 293. The en banc decision of the court of appeals in that case is reported at 914 F.2d 620 and is reprinted in the appendix to the petition (at 1a-182a) in No. 90-813.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. The petition in No. 90-757 was filed on November 14, 1990. The petition in No. 90-1032 was filed on December 28, 1990. This Court granted the petitions and consolidated them on January 18, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee

> set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

1. Louisiana elects its seven justices to the state supreme court from six judicial districts for ten-year terms. The First District, which includes Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, elects two justices at-large. Each of the other five districts elects one justice. La. Const. Art. 5, § 4; La. Rev. Stat. Ann. § 13:101 (West 1983). See Pet. App. 7a-8a; J.A. 46-47.

In September 1986, plaintiffs Ronald Chisom *et al.*, black registered voters in Orleans Parish, Louisiana, filed a complaint, alleging that the system for electing two state supreme court justices from the First Judicial District in at-large elections had the purpose and the effect of diluting black voting strength, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, the Equal Protection Clause of

the Fourteenth Amendment, and the Fifteenth Amendment. J.A. 5-11. The plaintiffs alleged that the elections in the First District, in which a majority of the population and registered voters are white, had been marked by, inter alia, racial bloc voting; that few blacks had been elected to public offices in the district; that there was no justifiable basis for singling out the First District for multi-member elections; and that the First District could be divided into two districts, each of which, like the remaining judical districts, would elect one justice. J.A. 7-9. The plaintiffs argued that an appropriate division along parish lines would produce one district—Orleans Parish—in which a majority of the population and registered voters would be black. J.A. 8, 10; Pet. App. 4a-6a.

2. The district court dismissed the complaint, holding that Section 2 of the Voting Rights Act of 1965 does not apply to judicial elections. *Chisom* v. *Edwards*, 659 F. Supp. 183 (E.D. La. 1987) (*reprinted at* J.A. 12-25). The court concluded that Section 2, by its terms, is violated only when minority voters prove that they lack an equal opportunity "to elect representatives of their choice." Section 2 therefore does not apply to judicial elections, the court held, since judges are not "representatives." 659 F. Supp. at 185-187.[2]

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[2] The district court also dismissed the plaintiffs' claims under the Fourteenth and Fifteenth Amendments, on the ground that the plaintiffs had not adequately alleged intent to discriminate. 659 F. Supp. at 187-189. The court of appeals reversed and reinstated those claims, *Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988), but after trial the district court held that the plaintiffs had not proved intentional discrimination, Pet. App. 63a-64a. Those claims are no longer at issue.

3. Plaintiffs appealed and the court of appeals reversed, holding that Section 2 applies to judicial elections. *Chisom* v. *Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom I*) (*reprinted at* J.A. 26-44). The court stated that the original language of Section 2, enacted in 1965, prohibited discrimination in any "voting qualification or prerequisite to voting or standard, practice, or procedure," and that Section 14 (c)(1) of the Act, 42 U.S.C. 1973*l*(c)(1), defined the term "voting" as applying to "any primary, special, or general election * * * with respect to candidates for public or party office and propositions for which votes are received in an election," demonstrating Congress's intent to prohibit a broad range of discriminatory electoral practices. 839 F.2d at 1059-1060. Because judges are "candidates for public or party office," the court held that the 1982 amendments to Section 2, which added the term "representatives" on which the district court relied, still applied to judicial elections. The 1982 amendments, the court concluded, did not limit the Act's scope, but instead enacted the "results" test that this Court had rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). 839 F.2d at 1060-1061. The court of appeals rejected the district court's reliance on the line of "one person, one vote" cases holding that judges are not representatives, on the ground that cases involving racial discrimination are not governed by the same considerations as cases involving nonracial reapportionment. *Id.* at 1060-1061.

The court also found relevant some secondary sources of congressional intent. For example, the court saw some indication in the legislative history of the 1982 Voting Rights Act amendments that Congress understood Section 2 to apply to judicial elec-

tions. 839 F.2d at 1061-1063. The court also relied on the holding in *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), summarily aff'd, 477 U.S. 901 (1986), that Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which requires preclearance of changes in electoral procedures in some States and which has relevant coverage language nearly identical to that of Section 2, applies to judicial elections. 839 F.2d at 1063-1064. Finally, the court noted that the Attorney General has consistently interpreted the Voting Rights Act as covering judicial elections. *Id.* at 1064.

The defendants sought review in this Court, which denied certiorari *sub nom. Roemer* v. *Chisom*, 488 U.S. 955 (1988).[3]

4. After trial,[4] the district court held that the plaintiffs had failed to prove a violation of Section 2 under the standard set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Specifically, the court held that plaintiffs had failed to prove that black voters are geographically compact or politically cohesive, or that there was significant racial bloc voting. Pet. App. 16a-62a.

5. The plaintiffs and the United States appealed, claiming that the district court's findings and conclusions were erroneous. Before the appeal was decided, however, the Fifth Circuit, sitting en banc, decided *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F.2d 620 (1990) (*LULAC*) (*reprinted at* 90-813 Pet. App. 1a-182a). The plaintiffs in *LULAC* alleged that the at-large election of trial judges in nine Texas counties diluted the ability of minority populations in each county to elect candidates of their choice, in violation of Section 2. In *LULAC*, the en banc Fifth Circuit, by a 7-6 vote, held that the Section 2 vote dilution test does not apply to the election of judges, and expressly overruled *Chisom I*.

The court held that while Section 2 generally applies to judicial elections, the vote dilution test of Section 2(b) does not, since judges are not "representatives" under Section 2(b) or as a general matter. *LULAC*, 914 F.2d at 625-627. As support for its interpretation, the court pointed out that the concept of minority vote dilution was modeled on the vote dilution standards developed in "one-man, one-vote" cases, *id.* at 627-628, and that by 1982 numerous federal court decisions, including a decision by this Court—*Wells* v. *Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court)—had ruled that "the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections," 914 F.2d at 626; *id.* at 626 n.9 (collecting cases). Applying the canon of construction that Congress is presumed to be aware of and endorse "the uniform construction" placed on a term, the majority determined that Congress used the term "representatives" in order to apply the new results test of Section 2 to elections for representative, politi-

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[3] The district court thereafter enjoined an election scheduled for the autumn of 1988, *Chisom* v. *Edwards*, 690 F. Supp. 1524 (E.D. La. 1988), but the court of appeals stayed the injunction, *Chisom* v. *Roemer*, 850 F.2d 1051 (5th Cir. 1988), and ultimately set it aside, *Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988).

[4] The United States intervened in the district court after the remand for trial. J.A. 2; see *id.* at 45-50. The United States had participated at earlier stages of the case as an amicus curiae.

cal offices but not to vote dilution claims in judicial contests. 914 F.2d at 628. The court found unpersuasive the fact that the definitional provision of the Act, 42 U.S.C. 1973*l*(c)(1), defined "voting" by reference to "candidates for public or party office," because the term "representatives" in Section 2 was more specific. *LULAC*, 914 F.2d at 629. Because Section 5 of the Voting Rights Act does not use the word "representatives," the majority also found irrelevant the fact that Section 5 applies to judicial elections. *Ibid.*

Six members of the en banc court, in three separate opinions, concluded that the dilution test of Section 2 applies to judicial elections. Judge Higginbotham, joined by three other judges, concluded that the term "representatives" encompasses elected judges. *LULAC*, 914 F.2d at 635-645. He nevertheless concluded that the at-large election of trial judges in Texas does not violate Section 2 since each trial judge, like each governor, occupies a so-called "single-person office" whose electorate cannot be further subdivided. In such instances, he said, electing all trial judges on an at-large basis does not dilute minority voting strength. 914 F.2d at 645-651. Concurring specially, Chief Judge Clark said that he agreed with Judge Higginbotham, adding that vote dilution analysis might be appropriate when a State elects its judges from single-member districts. *Id.* at 631-634. Judge Johnson dissented. In his view, the Section 2(b) vote dilution test applies to judicial elections, and the "single-person office" exception did not apply in the *LULAC* setting, because at the trial court level there were multiple office holders. 914 F.2d at 651-671.

6. Thereafter, the court of appeals issued a per curiam opinion in this case. Relying on *LULAC*, the

court remanded this case to the district court with directions to dismiss the Voting Rights Act claims for failure to state a claim upon which relief could be granted. Pet. App. 1a-3a.

SUMMARY OF ARGUMENT

A. The original version of Section 2 of the Voting Rights Act of 1965 covered the election of judges. Section 2 applied to any "voting qualification or prerequisite to voting or standard, practice, or procedure," while Section 14(c)(1) defined "vote" and "voting" to "include all action necessary to make a vote effective in any primary, special, or general election * * * with respect to candidates for public or party office." Together, these provisions applied to the election of any state or local officer, whether in the legislative, executive, or judicial branch. A candidate who stands in a primary or the general election for a position on a state trial or appellate court easily fits within that definition. The legislative history of the 1965 Act did not create an exception for judicial elections, and the principle that Congress intended "to give the Act the broadest possible scope," *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969), eliminates any lingering doubt.

B. The amended version of Section 2 enacted in 1982 also applies to judicial elections. Congress did not amend that law to shorten its reach; Congress revised Section 2 in order to enact the "results" test rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Congress accomplished that result by dividing Section 2 into two parts, adding to subsection (a) the term "results" and defining the new results test in subsection (b). But Congress did not alter the text of the original Section 2 defining the reach of that law ("[n]o voting qualification", etc.). Thus,

amended Section 2, like its predecessor, covers every election for public office.

The Fifth Circuit erred in *LULAC* in ruling that the term "representatives" in Section 2(b) exempts the election of judges from the results test of the statute. The legislative history of the 1982 amendments does not indicate that Congress used that term in order to limit the scope of Section 2. Congress used that term interchangeably with other terms such as "candidates" and "elected officials" to refer to elected officials, negating the suggestion that "representatives" was adopted as a term of art to describe a limited range of elected officials. The functions and responsibilities of judges obviously differ from those of other officials, but a State's decision to elect its bench indicates that the State wants to hold its judges accountable to the electorate. The Fifth Circuit also erred in relying on "one person, one vote" cases to determine that Congress excluded judges from the Section 2 results test. Congress did not rely on those decisions; instead, Congress looked to racial vote dilution cases and the principles they developed, which would apply to any elected official.

C. The thrust of the reasoning in *LULAC* and respondents' argument is that courts occupy a unique position in our government, that Congress surely was aware of and intended to protect that role when it amended Section 2 in 1982, and that Section 2 thus should not be read to treat judges in the same manner as legislators and executive officials. Those factors, however, are relevant to how the Section 2 results test applies to judicial elections, not to whether such elections are subject to the Act at all. In addition, such justifications must be examined in context. Louisiana has chosen to elect supreme court justices on a district-by-district basis, and therefore cannot

rely on the same justifications that could be invoked in the case of uniform at-large elections.

ARGUMENT

THE RESULTS TEST OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 APPLIES TO THE ELECTION OF STATE JUDGES

A. The Original Version Of Section 2, Enacted As Part Of The Voting Rights Act Of 1965, Applied To The Election Of State Court Judges

Section 1 of the Fifteenth Amendment held out the promise that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Although the text of that Amendment spoke in clear, broad terms, this Court's decisions showed that, in meeting the hard realities of the Reconstruction era and beyond, its reach exceeded its grasp. The Amendment invalidated pre-Reconstruction laws denying newly freed slaves the right to vote, but did not effectively grant blacks the franchise. Blacks were often robbed of their opportunity to participate in the political process because of a widely shared and deeply entrenched policy of excluding blacks from the ballot, the polling booth, and the party process. These efforts to deny blacks the franchise took various forms, such as outright exclusion from a polling booth,[5] physical intimidation and violence,[6]

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[5] See *United States* v. *Reese*, 92 U.S. 214 (1876).

[6] See *Ex parte Yarborough*, 110 U.S. 651 (1884).

the "grandfather clause,"[7] the "white primary,"[8] improper procedural hurdles,[9] racial gerrymandering,[10] improper challenges,[11] the discriminatory use of literacy tests,[12] and the poll tax.[13] History demonstrated that the policy of discrimination in voting was far too resilient for the Fifteenth Amendment alone to excise.

Finally, after "nearly a century of systematic resistance to the Fifteenth Amendment," Congress adopted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as a comprehensive means of enforcing the Fifteenth Amendment "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315, 328 (1966). Mindful of the protean nature of past discrimination, *id.* at 308-315; *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 118-121 (1978), Congress aimed the statute "at the subtle, as well as the ob-

[7] See *Guinn* v. *United States*, 238 U.S. 347 (1915); *Myers* v. *Anderson*, 238 U.S. 368 (1915).

[8] See *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[9] See *Lane* v. *Wilson*, 307 U.S. 268 (1939).

[10] See *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[11] See *United States* v. *Thomas*, 362 U.S. 58 (1960), summarily aff'g *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La. 1960).

[12] See *Schnell* v. *Davis*, 336 U.S. 933 (1949); *Alabama* v. *United States*, 371 U.S. 37 (1962), summarily aff'g 304 F.2d 583 (5th Cir. 1962); *Louisiana* v. *United States*, 380 U.S. 145 (1965).

[13] See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1963).

vious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969).

To achieve that end, Congress used broad terms to define the reach of the Act. For instance, Section 2, the basic component of that law, broadly prohibited discrimination in voting, stating that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973 (1976). Section 14(c)(1) defined the crucial words "vote" or "voting" in equally broad terms, providing that they would "include all action necessary to make a vote effective in any primary, special, or general election * * * with respect to candidates for public or party office." 42 U.S.C. 1973*l*(c)(1) (1976). Taken together, the plain language of Section 14(c)(1) applies the prohibitions of Section 2 to all elections regardless of the particular function performed by the specific office at issue. As this Court stated in *South Carolina* v. *Katzenbach*, 383 U.S. at 316, "Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds." See also *Allen* v. *State Bd. of Elections*, 393 U.S. at 566-567.

The text of the Voting Rights Act of 1965 therefore clearly applies to the election of state judges at the appellate or trial levels, whether at-large or on a district-by-district basis. When a State chooses to elect judges, candidates in those elections easily fit within the statutory definition of "voting," because those persons are "candidates for public * * * office."

And while the text of the Act is clear, the principle that Congress intended "to give the Act the broadest possible scope," *Allen* v. *State Bd. of Elections*, 393 U.S. at 567, is sufficient to eliminate any doubt that might linger.

For its part, however, a deeply divided Fifth Circuit in *LULAC* concluded that the definition of the statutory term "voting" in Section 14 carried "little force" since it was "a general term buried in a definitional section far from Section 2." *LULAC*, 914 F.2d at 629. That conclusion, however, is puzzling. The term "voting" is critical to a proper understanding of the difference between the electoral process, which the Voting Rights Act reaches, and the appointive process, whether for legislative, executive, or judicial offices, to which the statute does not apply. To state the obvious, Section 2 does not apply to the method of selecting a sergeant-at-arms for the state legislature or the counsel who assist a legislative committee, even though both processes involve the selection of a legislative officeholder. The reason for non-coverage in those instances is simply that in neither case does the public vote for a candidate. By the same token, Section 2 does not reach the method of appointing state court judges, but it does apply whenever judges stand as "candidates for public * * * office." 42 U.S.C. 1973*l*(c)(1). And a definitional section—wherever "buried" in a statute—seems to us a rather logical place to look to determine the scope of the statute's reach.

Two decisions by this Court construing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, support our conclusion. The Court has twice held that Section 5, which requires certain jurisdictions to submit changes in their voting procedures to the District of Columbia district court or the Attorney General for

preclearance, applies to the election of state judges. *Martin* v. *Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court); *Brooks* v. *Georgia State Bd. of Elections*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court).[14] Congress used the same operative language (*i.e.*, "voting qualification", etc.) in defining the scope of Sections 2 and 5 of the Act. Inasmuch as Congress is presumed to give terms the same meaning throughout a statute, see *Sullivan* v.

[14] This Court's summary affirmances are entitled to precedential value only as to the questions that were presented and necessarily decided in such cases. See, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 784 n.5 (1983); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). In both *Haith* and *Brooks* the question whether Section 5 covered changes with respect to judicial elections was presented to and necessarily decided by this Court.

In *Haith*, the defendants argued that the election of judges is not subject to Section 5 of the Voting Rights Act because judges are not subject to the "one-man, one-vote" principle and because they have functions different from those of legislators. The district court rejected that argument. 618 F. Supp. at 412. The defendants appealed the district court's judgment to this Court, and presented the question whether Section 5 applies to judicial elections. Jurisdictional Statement i (Question I), 4-15, *Martin* v. *Haith*, No. 85-1066. This Court summarily affirmed. *Martin* v. *Haith*, 477 U.S. 901 (1986). Similarly, the three-judge district court in *Brooks* held that Section 5 applies to the election of judges. The defendants appealed that judgment to this Court, and presented the question whether Section 5 applies to judicial elections. Jurisdictional Statement i (Question III), 19-21, *Georgia State Bd. of Elections* v. *Brooks*, No. 90-332. This Court again summarily affirmed. *Georgia State Bd. of Elections* v. *Brooks*, 111 S. Ct. 288 (1990). Accordingly, this Court's summary affirmances in *Haith* and *Brooks* necessarily held that Section 5 applies to the election of state court judges.

Stroop, 110 S. Ct. 2499, 2504 (1990); *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983), this Court's holdings in *Haith* and *Brooks* support the proposition that Section 2 applies to judicial elections.[15] Moreover, because Section 5 applies to the election of judges, excluding such elections from Section 2 leads, as Judge Higginbotham noted in *LULAC*, 914 F.2d at 645 (concurring in the judgment), to the "incongruous result" that a State covered by Section 5 cannot implement a new discriminatory voting procedure with respect to judicial elections, but such a discriminatory system already in effect cannot be challenged under the very statute that Congress intended to be used as the vehicle to redress such illegalities. The anomaly created by the Fifth Circuit's grudging interpretation of Section 2 suggests that Congress did not intend the law to have such curiously shifting coverage.

There is no contrary indication in the legislative history of the 1965 Act. See S. Rep. No. 162, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965); *Message from the President of the United States Relative to the Right to Vote*, H.R. Doc. No. 117, 89th Cong., 1st Sess. (1965). That should come as no surprise, in view of the broad language that Congress used to define the scope of that law. See *Allen* v. *State Bd. of Elections*, 393

[15] The district court in *Haith* expressly rejected the same type of argument that the Fifth Circuit found persuasive in this case and in *LULAC*: namely, that the election of judges is exempt from Section 5 because the "one-person, one-vote" standard applied in reapportionment cases does not apply to the election of judges. The court reasoned that "[a]s can be seen" from its text, "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413.

U.S. at 566. In sum, the original version of Section 2 clearly applied to judicial elections. *LULAC*, 914 F.2d at 637 (Higginbotham, J., concurring in the judgment).

B. The Revised Version Of Section 2, Added By The Voting Rights Act Amendments Of 1982, Also Applies To The Election Of State Judges

The Fifth Circuit did not dispute, either in this case or in *LULAC*, that the original version of Section 2 applied to the election of judges. Instead, the Fifth Circuit held in *LULAC* that Congress effectively narrowed the scope of Section 2 in the Voting Rights Act Amendments of 1982. As we explain below, that conclusion is badly off the mark. Congress did not intend to exempt judicial elections from Section 2, nor did it mistakenly pass a law that had such an unintended effect. For the reasons stated below, amended Section 2, like the original version, reaches the election of state judges.

1. *Congress added the results test to Section 2 in order to modify the elements of a violation of that law without also restricting its scope*

The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, were principally designed to reverse this Court's 1980 decision in *City of Mobile* v. *Bolden*. *Bolden* involved a vote dilution challenge brought under the original version of Section 2 against the at-large system for electing the city commission of Mobile, Alabama. The lower courts held that the at-large system was unlawful under the vote dilution standard adopted in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School*

Bd. v. *Marshall*, 424 U.S. 636 (1976), which did not require proof of intentional discrimination. This Court reversed without a majority opinion, but a plurality reasoned that the Act simply restated the constitutional standard and therefore required proof of discriminatory intent, which the plaintiffs had not proved in that case. 446 U.S. at 60-74.

Congress responded to *Bolden* by modifying Section 2 in order to enact the "results" test that this Court had rejected. S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) [hereinafter Senate Report]; *Thornburg* v. *Gingles*, 478 U.S. 30, 35, 44 n.8 (1986). Congress accomplished that goal by dividing Section 2 into two parts; by adding to subsection (a) the phrase "in a manner which results in a denial or abridgement of" the right to vote, as provided in the results test of subsection (b); and by defining that test in subsection (b) in a manner that "codif[ied] the leading pre-*Bolden* vote dilution case," *White* v. *Regester*, 412 U.S. 755 (1973). Senate Report 2.[16]

[16] Congress also relied on a series of decisions by the courts of appeals, principally the Fifth Circuit, analyzing electoral plans under the dilution inquiry developed by this Court in *White* and the Fifth Circuit in *Zimmer* v. *McKeithen*. Senate Report 23. The Senate Report referred to a list of 23 court of appeals' decisions that applied dilution principles to multi-member or single-member districting plans. The Report stated that Congress's intent was "to incorporate that [*White*] precedent and extensive case law which developed around it, into the application of Section 2." Senate Report 32; see also, *e.g.*, Senate Report 23, 29-30, 32-33; 1 *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1216-1226 (1982) [hereinafter Senate Hearings].

At the same time, Congress did not alter that portion of the text of Section 2 defining the reach of that statute (*i.e.*, the language referring broadly to "[n]o voting qualification", etc.).[17] Congress also left alone the definition of "voting" in Section 14(c)(1), which applies the Act to every election for "candidates for public * * * office." Thus, amended Section 2(a), like its predecessor (the 1965 version of the Act), encompasses elections of every stripe; there is no categorical exclusion of judicial elections.

Nothing in the legislative history of the 1982 amendments indicates that Congress intended to cut back on the reach of Section 2. The Senate Judiciary Committee Report accompanying the Senate's version of Section 2 stated that the Committee sought to amend that section to make clear that proof of intentional discrimination is not necessary to establish a Section 2 violation, and to enact the "results" test this Court had rejected in *Bolden*. Senate Report 2. The Committee concluded that "*White*, and the decisions following it made no finding and required no proof as to the motivation or purpose behind the practice or structure in question. * * * [T]he specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." Senate Report 28. Congress revised Section 2 in order to alter the proof necessary to establish a violation of

[17] After the amendments, Section 2(a) reads as follows (new language emphasized):

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of* the right of any citizen of the United States to vote on account of race or color * * * *as provided in subsection (b) of this section.*

that law, not to limit its scope. Nothing in the legislative history states that amended Section 2 does not apply to the election of state judges, or that the results test of Section 2(b) does not apply to such elections. The text of amended Section 2 is therefore controlling. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies*, 111 S. Ct. 615, 623 (1991); *Sullivan* v. *Stroop*, 110 S. Ct. at 2502-2503.

In sum, neither the text of Section 2 nor its purpose or history shows that Congress deliberately exempted judicial elections from the results test of that law. If, as the majority below surmised, Congress intended in 1982 to restrict the scope of Section 2 so that it no longer covered judicial elections, it is reasonable to suppose that Congress would have said so. It did not say so, because it harbored no such intent.

2. *Congress used the term "representatives" in Section 2 in order to refer to any type of elected official, not to exclude judges from the scope of that law*

In determining that Section 2's results test does not apply to judicial elections, the Fifth Circuit in *LULAC* relied heavily on Congress's use of the term "representatives" in subsection (b). The *LULAC* majority reasoned that the term "representatives" necessarily excludes elected judges, and that when it amended the Voting Rights Act in 1982, Congress knew about and relied on a line of decisions holding that the "one-person, one-vote" principle stemming from *Reynolds* v. *Sims*, 377 U.S. 533 (1964), does not apply to judicial elections because judges are not "representatives." *LULAC*, 914 F.2d at 624-629.[18]

[18] Several decisions by this Court and others have ruled that the "one person, one vote" standard of apportionment does not apply to the election of judges. See *Sagan* v. *Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982), appeal dismissed, 714 F.2d 124 (3d Cir. 1983) (Table); *Gilday* v. *Board of Elections*, 472 F.2d 214 (6th Cir. 1972); *Concerned Citizens* v. *Pine Creek Conservancy Dist.*, 473 F. Supp. 334 (S.D. Ohio 1977); *Buchanan* v. *Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972); *Wells* v. *Edwards*, 347 F. Supp. 543 (M.D. La. 1972) (three-judge court), summarily aff'd, 409 U.S. 1095 (1973); *Holshouser* v. *Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), summarily aff'd, 409 U.S. 807 (1972); *Sullivan* v. *Alabama State Bar*, 295 F. Supp. 1216 (M.D. Ala.), aff'd mem., 394 U.S. 812 (1969); *Kail* v. *Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967); *Romiti* v. *Kerner*, 256 F. Supp. 35 (N.D. Ill. 1966); *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), and vacated, 400 F.2d 882 (6th Cir.), cert. denied, 393 U.S. 839 (1968); *Stokes* v. *Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964). See generally *LULAC*, 914 F.2d at 626 n.3 (collecting cases).

Respondents make the same argument. See 90-757 Br. in Opp. 8-29. Although the argument has superficial appeal, it is ultimately mistaken.

a. Congress patterned the results test it enacted in 1982 after a passage in this Court's decision in *White* v. *Regester*, 412 U.S. 755 (1973), which involved a constitutional challenge to the election of state legislators. The relevant passage focused on the question whether minority voters "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766. Congress incorporated that principle into the Act, but substituted the word "representatives" for "legislators." Congress did not define "representatives," and thus the term should be given its "ordinary meaning." *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *Russello* v. *United States*, 464 U.S. 16, 21 (1983); *Richards*

v. *United States*, 369 U.S. 1, 9 (1962). But "representative" has more than one ordinary meaning, see *Webster's Third New International Dictionary* 1926-1927 (1986) (*Webster's*), so the question becomes what degree of generality Congress had in mind for this term when it adopted Section 2.

For example, "representative" can mean "a member of the House of Representatives of the U.S. Congress" or "a member of a house of representatives in a state legislature." *Webster's* 1926. See U.S. Const. Art. I, §§ 1-2, 4-7. Read that way, "representative" would have the same meaning as "legislator," see *Webster's* 1291, and would exclude judges. But that relatively narrow construction also would exclude a variety of executive officials that Congress intended to reach under Section 2, such as the President, state governors, city mayors, district attorneys, and county sheriffs. Those officials are not "legislators," see U.S. Const. Art. II, but can be described as "representatives." In fact, in *Myers* v. *United States*, 272 U.S. 52, 123 (1926), this Court used that precise term to describe the President. Speaking through Chief Justice Taft, the Court explained in *Myers* that "[t]he President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide." Respondents appear to agree with that proposition. See 90-757 Br. in Opp. 8 ("Members of the legislative and executive branches are certainly representatives.").

The Fifth Circuit believed that judges, in contrast to legislative and executive branch officials, cannot be "representatives" because the two roles are utterly

incompatible. Whereas legislators are properly accountable to the wishes of the electorate, judges should stand above the views of their communities and should resolve disputes and interpret the law without attempting to satisfy discrete segments of the community. *LULAC*, 914 F.2d at 625-626 (quoting Hickok, "Judicial Selection: The Political Roots of Advice and Consent," in *Judicial Selection: Merit, Ideology, and Politics* 5 (1990)). Just so. Indeed, the Fifth Circuit was entirely correct in noting that elected judges do not represent voters in the same way legislators do. But that hardly means that elected judges can in no sense be considered representatives of the community they serve. As Judge Higginbotham aptly stated, *LULAC*, 914 F.2d at 636:

> The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will. This reality belies the bold assertion that judges are in no sense representatives. The assertion that judges are not representatives actually masks a concern that judges *should not* be representatives. This is a choice left to the states. * * * While judges are indeed far removed from the logrolling give and take of the legislative and even executive processes, the effort to assure "sensitivity" and "accountability" through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law. State judges, wearing their common law hats, face decisions such as whether to adopt a comparative fault standard, and in doing so represent the people in a very real sense. At least at this level of generality judges are indisputably represen-

> tatives of voters. Saying so in no way steps on the equally indisputable difference between judges and other representatives—that judges do not represent a specific constituency.

The situation of an elected prosecutor is not dissimilar. Such an official is readily understood to be a "representative," even though his prosecutorial decisions should not be based on partisan political considerations, as the decisions of a legislator may be.[19]

"Representative" can refer to anyone elected to public office since the definition includes a person who "represents another as agent, deputy, substitute, or delegate usu[ally] being invested with the authority of the principal." *Webster's* 1926-1927. That definition encompasses judges because the State, and ultimately the public, delegates to judges the authority to adjudicate civil disputes and criminal charges. *Myers* demonstrates that it is not incorrect to describe an elected official other than a legislator as a "repre-

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[19] In our federal system, States are free to have their judges represent the community in a way that federal judges do not. Article III judges are given life tenure and salary protection precisely in order to insulate them from the sentiment of the community. But the States "are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (collecting cases). *E.g., Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-613 (1937) (Cardozo, J.). Federal law does not restrict the functions state judges can be authorized to perform, and it is a mistake to read the term "representative" in light of the "properly limited" role of federal courts. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Congress did not intend that every Section 2 case begin with an inquiry into whether the elected officials at issue are best characterized as judicial, nonjudicial, or, if they are hybrids, as predominantly one or the other.

sentative," and there is no necessary reason why a judge also cannot be characterized in that manner. A State that elects its bench endorses the view that judges should be responsible to and should express the views of the community on the policy matters that are resolved in court, and common law judges—unlike federal judges—are frequently called upon to decide questions of policy. Also, judges "do and must legislate," if "only interstitially * * * from molar to molecular motions," in order to resolve cases when statutes or decisions do not neatly fit together. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Accordingly, a system of electing judges is certainly among those situations in which the Voting Rights Act seeks to ensure that minorities are not denied an equal opportunity to participate in the political process.

This case illustrates the point. Louisiana elects its supreme court justices from various districts within the State, and each justice can readily be said to "represent" his district on that court. In fact, a 1921 Report of the Louisiana Bar Association submitted to the Louisiana Constitutional Convention used that exact term to characterize the members of the state supreme court: "Each justice and judge now in office should be considered as a representative of the judicial district within which is situated the parish of his residence at the time of his election." GX 27. The Report's use of that term indicates that a judge can properly be characterized as a "representative" even if he is not a "legislator." What is more, Louisiana's use of a district-by-district means of filling the state supreme court indicates that Louisiana has concluded that geographic diversity helps ensure that all viewpoints are adequately represented on that court. In this setting, there is nothing

unusual in treating state judges as precisely the type of "representatives" that the Voting Rights Act of 1965 was designed to cover. See *LULAC*, 914 F.2d at 633 (Clark, C.J., concurring specially).

b. The available evidence indicates that Congress used the term "representatives" interchangeably with "elected officials" or "candidates" when discussing the scope of Section 2. Congress did not use the word "representatives" as a narrow "term of art," *LULAC*, 914 F.2d at 628, but as a broader term that included all elected officials.

Following the completion of Senate Subcommittee hearings, but before the proposed amendments were sent to the full Congress, the Senate Judiciary Committee held several executive sessions at which the language that was ultimately enacted as amended Section 2 was first introduced.[20] The discussion at the executive sessions shows that Congress did not choose the word "representatives" to limit the types of elections that Section 2 would reach, since there was no discussion of any such limitation. The text that the Subcommittee considered during its hearings would have added the term "results" to Section 2, but would not have codified the *White* v. *Regester* standard in a separate subsection (b), and therefore did not refer specifically to "representatives." H.R. 3112, 97th Cong., 1st Sess. (1981), which had passed the House, would have amended Section 2 by deleting "to deny or abridge" and adding "in a manner which results in a denial or abridgement of." See 1 Senate Hearings 57. After the Subcommittee rejected the House bill, Senator Dole offered a compromise bill that ultimately became subsection (b). Senator Dole

[20] The Executive Sessions are transcribed in the Appendix to the Hearings of the Subcommittee on the Constitution of the Senate Judiciary Committee. 2 Senate Hearings.

said that he drafted the text of that proposal to calm the fears of some opponents to the House bill that a results test would lead to proportional representation. See 2 Senate Hearings 60-62. He noted, however, that his text effectively retained the results standard of the House bill. *Id.* at 62. Thus, subsection (b) was not drafted in order to scale back the reach of subsection (a), but simply to make clear that the amended Section 2 did not require the proportional election of minority candidates. The important language in subsection (b) was not "representatives," but "of their choice" (versus "of their race").

Neither the Senate nor the House read the proposed version of amended Section 2 as limited to "legislators." The Senate Report used the terms "candidates" or "elected officials" interchangeably with the term "representatives" when discussing Section 2. *Mallory* v. *Eyrich*, 839 F.2d 275, 279-280 (6th Cir. 1988).[21] Senator Hatch, the Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee, which held hearings on the legislation, wrote a separate report on the proposed amendments to Section 2 in which he also used the term "candidates" when describing the Senate bill. Senate Report 100.[22] Sen-

[21] See Senate Report 28 ("If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect *candidates* of their choice, there is a violation of this section.") (emphasis added); *id.* at 30 ("candidates"), 31 ("candidates"), 32 ("representatives"), 67 ("candidates"). See also *id.* at 67 n.222, citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971) ("legislative candidates").

[22] Indeed, Senator Hatch's Subcommittee published its own report on the legislation, in which it criticized the results test. The Report stated that it would apply to "*all* governmental units, including * * * judicial districts." Senate Report 151. While the legislation that was before the Subcommittee did

ators Dole, Kennedy, and Mathias, the principal sponsors of amended Section 2, see 128 Cong. Rec. 14,114 (1982), consistently used the word "candidates"—not "representatives"—when discussing the proposed legislation during the floor debates.[23] Other Members of Congress also referred to "candidates," rather than "representatives," when discussing the bill.[24] No one expressed any intent to use the term "representatives" as a means of excluding judicial elections from the dilution inquiry of *White* v. *Regester*. The absence of any mention of such a limitation on the reach of the dilution test strongly suggests that none was intended. Cf. *Dillard* v. *Crenshaw County*, 831 F.2d 246, 250-251 (11th Cir. 1987) ("Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official.").

Although the Fifth Circuit believed that Congress relied on the line of cases holding that the "one person, one vote" theory is inapplicable to judicial elections, *LULAC*, 914 F.2d at 628-629, there is, in fact,

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not have the language that became subsection (b), Senator Hatch, commenting on the compromise with subsection (b) offered by Senator Dole at the executive sessions, said that "[t]he impact of the proposed compromise is not likely to be one wit different than the unamended House provision relating to section 2." 2 Senate Hearings 70 (Sen. Hatch). Clearly, neither the proponents nor opponents of the legislation intended that the word "representatives" would exclude judges.

[23] See 128 Cong. Rec. at 14,114 (Sen. Mathias); *id.* at 14,132 (Sen. Dole); *id.* at 14,140 (Sen. Kennedy); *id.* at 14,291-14,292 (Sen. Kennedy); *id.* at 14,316 (Sen. Dole).

[24] *E.g.*, *id.* at 13,127 (Sen. Hatch); *id.* at 14,133 (Sen. Thurmond); *id.* at 14,934-14,935 (Rep. Sensenbrenner). See *id.* at 13,131 (Sen. Hatch refers to "officeholders").

no evidence of such reliance. Nowhere in the legislative reports and debates did any member of Congress rely on those decisions. Instead, Congress relied explicitly on a list of 23 cases, principally from the Fifth Circuit, that had applied the vote dilution standard adopted by this Court in *White* v. *Regester* and by the Fifth Circuit in *Zimmer* v. *McKeithen*. The Senate Report noted that there is "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify. * * * These 23 cases represent the actual judicial understanding and application of the *White* standard codified in the Committee bill." Senate Report 32. See also *id.* at 23, 31, 33. An examination of those cases demonstrates that Congress did not choose the term "representative" in order to limit the reach of Section 2. The courts used the terms "representatives," "candidates," and "officeholders" interchangeably with no indication that the term "representatives" had the limited meaning that term was given in the apportionment line of cases. See also *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971) (referring to "legislative candidates").[25]

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[25] For example, the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, which was prominently mentioned in the legislative history, Senate Report 23, 33, referred to "representatives" and "candidates." 485 F.2d at 1305, 1307. *United States* v. *Board of Supervisors*, 571 F.2d 951 (5th Cir. 1978), referred to "elected officials" and "candidates," and said that "the court must also be aware of the fact that supervisors' beat lines also form the election districts for individual county officeholders, such as *justice court judges* and constables." *Id.* at 956 n.9 (emphasis added). See also, *e.g.*, *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973) ("candidates" and "public office"); *Moore* v. *LeFlore County Bd. of Election Comm'rs*, 502 F.2d 621 (5th Cir. 1974) ("public office");

Nor is there any reason to think that Congress incorporated "one person, one vote" principles as the guidepost for Section 2. Malapportionment cases address issues of "substantial equality of population," *Reynolds* v. *Sims*, 377 U.S. at 559; they do not address questions of racial discrimination or the effective cancellation of a person's vote because of that discrimination. For example, in *White* v. *Regester* this Court reversed the finding that a state reapportionment plan violated "one person, one vote" standards, but sustained a finding of racial vote dilution. Similarly, *Gaffney* v. *Cummings*, 412 U.S. 735, 751 (1973), and *City of Mobile* v. *Bolden*, 446 U.S. at 65, 78 (plurality opinion), each stated that the "one person, one vote" principle was inapplicable to a claim of racially based vote dilution. The Senate Report recognized that the concept of geographic vote dilution began with this Court's decision in the *Reynolds* case, but nevertheless concluded that racial vote dilution cases involve a materially different type of constitutional violation. Senate Report 20-21.[26]

Bradas v. *Rapides Parish Policy Jury*, 508 F.2d 1109 (5th Cir. 1975) ("elected officials"); *Wallace* v. *House*, 515 F.2d 619, 629, 631 (5th Cir. 1975) ("candidates" and "representatives"), vacated on other grounds, 425 U.S. 947 (1976); *Perry* v. *City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) ("public office"); *David* v. *Garrison*, 553 F.2d 923 (5th Cir. 1977) ("representatives" and "candidates"); *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir. 1977) ("candidates"); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc) ("elected officials," "county officers," "representatives," and "candidates"), cert. denied, 434 U.S. 968 (1977).

[26] In fact, Senator Hatch disavowed reliance on *Reynolds*, stating that the concept of vote dilution articulated in *Reynolds* "is an entirely different concept than the one that has evolved under provisions of the Voting Rights Act. * * * The *Reynolds* and [Voting Rights Act] notions of 'vote dilution' have nothing in common but the name." 128 Cong. Rec. 13,129 (1982).

And the only circuit court decision before 1982 addressing the question whether a vote dilution claim concerning the election of judges should be analyzed under malapportionment principles rejected reliance on the "one person, one vote" line of decisions. *Voter Information Project* v. *City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

Finally, there is other circumstantial evidence that Congress did not exempt judicial elections from amended Section 2 by using the term "representatives." The House and Senate hearings on the 1982 Amendments contain various references to judicial elections, principally in the context of statistics indicating the progress made by minorities under the Act in such elections up to 1982.[27] In addition, 41 States elect some or all of their judges, see *The American Bench* (M. Hough 4th ed. 1987-1988), and the Members of Congress presumably are aware of the electoral practices in their own States. Under these circumstances, it is reasonable to expect that Congress would have discussed why judicial elections should be exempted from amended Section 2 if Congress intended to do so, particularly since *only* judicial elections are exempt under the Fifth Circuit's interpretation of the Act. Cf. *Sheet Metal Workers Int'l Ass'n* v. *Lynn*, 488 U.S. 347, 356 (1989). The

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[27] See, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); 1 Senate Hearings 208-209, 669, 748, 788-789, 1228, 1769, 1777, 1781.

fact that Congress did not do so, like the fact that the dog did not bark, is significant; it serves as a strong indication that Congress did not exempt such elections from Section 2.[28]

c. The Fifth Circuit in *LULAC* indicated that while the Section 2(b) results test does not apply to judicial elections, the general prohibition on racial discrimination in voting in Section 2(a) is still applicable. *LULAC* reasoned that, prior to 1982, Section 2 prohibited only discriminatory tests or devices. The two phrases that Congress inserted into Section 2(b) in 1982 from this Court's decision in *White* v. *Regester*—"opportunity to participate" and "opportunity to elect"—*LULAC* went on to say, actually described two different types of violations: The first phrase described only the pre-1982 ban on racial discrimination in voting, and the second phrase expanded Section 2 by adopting the vote dilution standard. The election of judges is exempt only from the latter provision, *LULAC* concluded, because the Act used the term "representatives" only in that regard. 914 F.2d at 624-625.

"The short answer" to that proposition "is that Congress did not write the statute that way." *Russello* v. *United States*, 464 U.S. at 23. Congress did not limit the scope of the results test to "representatives" in order to exempt judges due to the unique

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[28] See Arthur Conan Doyle, "Silver Blaze," in *The Complete Sherlock Holmes* (1927). Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

nature of the judicial office. The unique functions that judges perform can be taken into consideration as part of the Section 2 results test, as we have explained in our amicus brief in *Houston Lawyers Ass'n* v. *Attorney General*, No. 90-813 (consolidated with *League of United Latin American Citizens* v. *Attorney General*, No. 90-974), cert. granted (Jan. 22, 1991).[29] But Congress drafted Section 2 in a manner that allows a plaintiff to attempt to prove a violation of the Act under a vote dilution theory in the case of any elected official. Accordingly, if elected judges are "representatives," as we submit they are, then the Section 2 results test is applicable.

In addition, the Fifth Circuit's conclusion (that the language drawn from *White* v. *Regester* described two different types of violations) is incorrect. *White* v. *Regester* was a dilution case; it had nothing to do with tests or devices; and both phrases—which appear side-by-side in the Court's opinion, see 412 U.S. at 765-766—were used to describe the dilution inquiry. As Judge Higginbotham explained, "the statutory language cannot be parsed to read that judicial elections are not subject to dilution claims, but *are* subject to the remaining strictures of Section 2." *LULAC*, 914 F.2d at 643 (concurring in the judgment). The Fifth Circuit's analysis also gives the statute an odd construction, creating an artificial and litigation-provoking distinction between practices that affect "participation" and that affect "electing." Finally, the 1982 amendments did not "expand" Section 2 to cover practices that the Act did not previously reach; those amendments enacted the "results" standard while maintaining Section 2's existing coverage.

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[29] We have provided a copy of our amicus brief in *LULAC* to counsel in this case.

C. The State's Strong, Nondiscriminatory Reasons For The Structure Of Its Judicial System Are Among The "Totality Of Circumstances" That The Courts Must Consider Under Section 2

The thrust of the reasoning of the majority and concurring opinions in *LULAC* (and the contention made by respondents here) is that the courts occupy a unique position in our government, one that Congress surely was aware of and intended to protect when it amended Section 2 in 1982. That submission draws strength from the axiom that the judiciary exemplifies the principle that ours is a government of laws, not men, and the corollary that courts must impartially administer justice without concern for the political considerations that are grist for the mill in the other branches. Since courts do and should stand above politics, the argument goes, the Voting Rights Act should not be read in a manner that treats the judiciary in the same manner as the legislative and executive branches.

That argument, we believe, is a powerful one. It is certainly true that concern over the outcome of judicial elections was not the triggering event that led Congress to revise Section 2 in 1982. Instead, Congress amended the statute principally to address the problem that racial vote dilution had consistently defeated the efforts of minorities to be elected to positions like the city commission of Mobile, Alabama. It is also fair to assume that Congress was aware of the unique role that the courts play in our democratic form of government. Congress, this Court has noted, is "'predominantly a lawyer's body,' *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), and it is appropriate for us 'to assume that our elected representatives . . . know the law.' *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697

(1979)." *Albernaz* v. *United States*, 450 U.S. 333, 341 (1981). That is important because it has been one of our fundamental rules of law since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that courts have a unique role in our government. The 1982 Amendments did not abandon that principle. At the same time, the conclusion to which the foregoing argument leads—*i.e.*, the election of judges is exempt from Section 2—is far broader than what the text of the Act permits or what Congress intended.

In our view, the fact that elected judges have functions different from those of elected legislative or executive officers—and that States may structure their electoral practices with those functions in mind—are legitimate factors that a court must weigh among the "totality of circumstances" when adjudicating a Section 2 challenge to judicial elections. The manner in which Section 2 applies to such elections therefore may well differ from the way that the Act applies in the case of other elected officials. In other words, the reasons set forth by the majority and concurring opinions in *LULAC* for exempting judges from the Section 2 results test are factors for courts to consider when applying that test, even though they are not persuasive reasons for exempting judges from Section 2 altogether.

Our amicus brief in the companion *LULAC* case addresses this matter in the context of the at-large election of Texas district judges. There, we argue that a State's strong, nondiscriminatory interests in having a judiciary that is representative, impartial, and perceived as such by the community, are important factors for courts to consider under the "totality of circumstances." Because those state interests are

legitimate and "strong," *Zimmer* v. *McKeithen*, 485 F.2d at 1305, if not compelling, they could spell the difference between a violation of Section 2 and a lawful electoral scheme.

This case, however, is materially different from *LULAC*. Unlike Texas district court judges, the justices of the Louisiana Supreme Court are not elected on a statewide at-large basis; they are elected from six separate judicial districts within the State, even though the Louisiana Supreme Court has statewide jurisdiction. This electoral system shows that Louisiana has made a choice that differs from the one made by Texas. Louisiana believes that its supreme court will best represent the community and best carry out its judicial function if the justices are elected from different geographic regions within the State. Whatever the validity of the interests Texas advances for its at-large electoral system, those interests are inapplicable here.

Accordingly, regardless of the outcome in *LULAC*, if this Court holds that Section 2 applies to the election of judges, a remand is necessary in this case in order to permit the court of appeals to review the district court's finding that the plaintiffs did not establish a Section 2 violation. The court of appeals has not yet addressed any of the district court's findings, and the court of appeals should be afforded the initial opportunity to do so.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Nos. 90-757 and 90-1032

In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED JANUARY 18, 1991

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-757

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

No. 90-1032

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 86-4075

RONALD CHISOM AND UNITED STATES

v.

CHARLES E. ROEMER, ET AL.

RELEVANT DOCKET ENTRIES

DATE FILED	DOCUMENT
9/19/86	Complaint.
	* * *
9/30/86	Pltf's amended complt.
	* * *
5/1/87	OPINION that defts' mtn to dismiss for failure to state a claim upon which relief can be granted is granted; unless pltfs' complt is amended w/in 10 days of entry of this opinion clerk of Court is directed to enter judg dismissing pltfs' claim at their costs.
	* * *
5/7/87	Pltf's *NOTICE OF APPEAL* to 5th Circuit from judg of 5/1/87 granting deft's mtn to dismiss.
	* * *

DATE FILED	DOCUMENT
5/31/88	JUDGMENT FROM 5TH CIRCUIT—ORDERED that judg of D.C. is REVERSED & case is REMANDED to D.C. for further proceedings. (Brown, Johnson & Higginbotham) issd as mandate 5/27/88.
	* * *
8/8/88	INTERVENTION OF U.S.A.
8/15/88	ANSWER of defts to pltfs' complt.
	* * *
4/4/89	ANSWER of defts to intervention.
	* * *
4/5/89	NON JURY TRIAL dktd 4/6/89.
	* * *
9/13/89	OPINION—Clerk is directed to enter judg in favor of defts dismissing pltf's claims. (CSjr) dltd 9/13/89.
9/14/89	JUDGMENT is ORDERED in favor of all defts & agst all pltfs & U.S.A. as intervenor, dismissing suit w/prj, pltfs to bear all costs. 9/13/89 dktd 9/14/89.
	* * *
9/15/89	Pltfs' *notice of appeal* from final judgment entered on 9/13/89.
	* * *
11/13/89	*Notice of appeal* by U.S.A. from judg entered 9/14/89.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3463

RONALD CHISOM, ET AL.

v.

EDWIN EDWARDS, ET AL.

RELEVANT DOCKET ENTRIES

DATE FILED	DOCUMENT
	* * *
2/29/88	Opinion rendered.
	* * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3654

RONALD CHISOM AND UNITED STATES

v.

CHARLES E. ROEMER, ET AL.

RELEVANT DOCKET ENTRIES

DATE FILED DOCUMENT

* * *

11/02/90 Opinion rendered – remanded.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NUMBER 86-4075

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARC MORIAL, LOUISIANA VOTER REGISTRATION/ EDUCATION CRUSADE, AND HENRY A. DILLON, III

PLAINTIFFS

versus

EDWIN EDWARDS, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA; JAMES H. BROWN, IN HIS CAPACITY AS SECRETARY OF THE STATE OF LOUISIANA; AND JERRY M. FOWLER, IN HIS CAPACITY AS COMMISSIONER OF ELECTIONS OF THE STATE OF LOUISIANA

DEFENDANTS

Section A
Magistrate 6

CLASS ACTION
THREE JUDGE COURT

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

This action is brought by the plaintiffs on behalf of all black registered voters in Orleans parish to challenge the election of Justices to the Louisiana Supreme Court from the New Orleans area. Plaintiffs contend that the present system of electing judges, whereby the parish of Orleans, St. Bernard, Plaquemines, and Jefferson elect two Justices to the Louisiana Supreme Court at-large, is a violation of

the 1965 Voting Rights Act, as amended, 42 U.S.C. Section 1973 because it dilutes the voting strengths of plaintiffs.

II. JURISDICTION

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. Section 1973 and 42 U.S.C. Section 1983. This Court has jurisdiction pursuant to 28 U.S.C. Section 1331 and Section 1343 as well as 42 U.S.C. Section 1973.

Plaintiffs also seek declaratory and other appropriate relief pursuant to 28 U.S.C. Sections 2201 and 2202.

Plaintiffs' claims under the Voting Rights Act and under the Fourteenth and Fifteenth Amendments to the U.S. Constitution must be determined by a district court of three judges pursuant to 28 U.S.C. Sect. 2284 (a).

III. PARTIES

The individual plaintiffs are all black registered voters in Orleans parish. The organizational plaintiff is a non-profit corporation comprised of Orleans Parish black registered voters active in voting rights issues. The plaintiffs sue on behalf of themselves and all other black registered voters in Orleans parish.

Edwin Edwards is Governor of the State of Louisiana. He is sued in his official capacity of Governor. Mr. Edwards has the duty to support the Constitution and laws of the State of Louisiana and of the United States and to see that these laws are faithfully executed.

James H. Brown is Secretary of the State of Louisiana. He is sued in that official capacity. As Secretary of State, Mr. Brown has the duty to prepare and certify the ballots for all elections, promulgate all election returns and administer the election laws of Louisiana.

Jerry M. Fowler is Commissioner of Elections of the State of Louisiana. He is sued in that official capacity. As

Commissioner of Elections, he has the duty to work closely with the office of the Secretary of State to prepare and certify the ballots for all elections held in Louisiana.

IV. CLASS ACTION ALLEGATIONS

This matter is brought as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all black persons who are residents and registered voters of Orlean parish, State of Louisiana.

The number of persons who would be included in the above-defined class would be approximately 135,000.

Plaintiffs are adequate representatives of the class in that they are similarly situated with the rest of the members of the class. There are no actual or potential conflicts of interest and the attorneys for plaintiffs are competent and able to handle the litigation.

The questions of law and fact common to the class are those implicit in this complaint including whether the defendants should be ordered to comply with the Voting Rights Act in the election of Justices to the Louisiana Supreme Court from the New Orleans area.

V. FACTS

The State of Louisiana elects seven Justices to the Louisiana Supreme Court.

The method of electing Justices to the Louisiana Supreme Court is set out at Louisiana Revised Statute 13:101. This statute orders that the state be divided into six Supreme Court districts which elect seven Justices. Each of the Supreme Court districts elects one Justice, except for the First Supreme Court district which elects two Justices at-large.

The First Supreme Court district is made up of the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson, from which two Justices are elected at-large.

The First District is the only Supreme Court district in Louisiana that is not a single member district.

The First Supreme Court District of Louisiana contains approximately 1,102,253 residents of which 63.36% or 698,418 are white and 379,101 or 34.4% are black. The voter registration data for the First Supreme Court District of Louisiana indicates a total registered voter population of 515,103. Of this total, 350,213 or 68% are white and 162,810 or 31.61% are black.

If the First Supreme Court District of Louisiana were divided into two single member districts, the average population would be approximately 551,126 persons in each district. Because Orleans parish's present population is 555,515, the most logical division of the district into two single member districts would have Orleans parish electing one Supreme Court Justice and the parishes of Jefferson, St. Bernard, and Plaquemines together electing the other Supreme Court Justice.

If the present First Supreme Court District was divided as indicated in the preceding paragraph, the Orleans parish district would have a black population and voter registration majority. The Orleans parish district would have 236,987 white residents or 42.5% and 308,149 black residents or 55.3%. The voter registration figures indicate that the district would have 124,881 white voters or 47.9% and 134,492 black voters or 51.6%.

The Supreme Court district which would be comprised of Jefferson, Plaquemines, and St. Bernard would have a total population of 544,738 of which 461,431 or 84.7% would be white and 70,952 black residents or 13.0%. The voter registration data indicates that 225,332 registered voters are white or 88.5% while 28,318 black voters are also registered or 11.1%.

Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any blacks elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court Justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

VI. CAUSES OF ACTION

The defendants are in violation of Section 2 of the 1965 Voting Rights Act, as amended, 42 USC Section 1973 because the present method of electing two Justices to the Louisiana Supreme Court at-large from the New Orleans area impermissibly dilutes minority voting strength.

The defendant's actions are in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 USC Section 1983 in that the purpose and effect of their actions is to dilute, minimize, and cancel the voting strength of plaintiffs.

VII. EQUITY

This action is an actual controversy between parties having adverse legal interests of such immediacy and reality as to warrant a declaratory judgment.

Plaintiffs have no adequate remedy at law and will suffer irreparable injury unless injunctive relief is issued.

VIII. PRAYER

WHEREFORE, plaintiffs pray for relief as follows:

1. That a District Court of three judges be convened pursuant to 28 U.S.C. Sect. 2284 and 42 U.S.C. Sect. 1973 to adjudicate this matter;

2. That this matter be certified as a class action;

3. That a preliminary and permanent injunction issue against the defendants as follows:

a. Restraining defendants from allowing any further elections of Justices from the First Supreme Court District in accordance with Louisiana Revised Statute 13:101 Subsection 1 until this court makes a decision on the merits of plaintiff's challenge;

b. Ordering the defendants to reapportion the First Louisiana Supreme Court District in a way that fairly recognizes the voting strength of minorities in the New Orleans area and completely remedies the present dilution of minority voting strength.

c. Ordering the defendants to comply with the 1965 Voting Rights Act, as amended, 42 USC Section 1973;

4. That this court declare and determine that the present system of electing two Justices at-large from the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson pursuant to Louisiana Revised Statute 13:101 Sub-section 1 impermissibly dilutes minority voting strength and violates the 1965 Voting Rights Act, as amended, and also violates the Fourteenth and Fifteenth Amendments to the United States Constitution.

5. That attorney fees be awarded to plaintiffs;

6. That there be other such relief as may be necessary and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-4075

RONALD CHISOM, ET AL

versus

EDWIN EDWARDS, ET AL

Section: "A"

AMENDED OPINION

This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6). For the foregoing reasons, defendants' motion is GRANTED.

FACTS AND ALLEGATIONS

Ronald Chisom, four other black plaintiffs and the Louisiana Voter Registration Education Crusade filed this class action suit on behalf of all blacks registered to vote in Orleans Parish. Plaintiffs' complaint challenges the process of electing Louisiana Supreme Court Justices from the First District of the State Supreme Court. The complaint alleges that the system of electing two at-large Supreme Court Justices from the Parishes of Orleans, St. Bernard, Plaquemines and Jefferson violates the 1965 Voting Rights Act, as amended, 42 U.S.C. § 1973 the fourteenth and fifteenth amendments to the United States Federal Constitution and, finally, 42 U.S.C. § 1983. Plaintiffs argue that the election system impermissibly dilutes, minimizes and cancels the voting strength of blacks who are registered to vote in Orleans Parish.

More specifically, plaintiffs' original and amended complaint avers that the First Supreme Court District of Louisiana contains approximately 1,102,253 residents of which 63.36%, or 698,418 are white, and 379,101, or 34.4% are black. The First Supreme Court District has 515,103 registered voters, of which 68% are white, and 31.61% are black. Plaintiffs contend that the First Supreme Court District of Louisiana should be divided into two single districts. Plaintiffs suggest that because Orleans Parish's present population is 555,515 persons, roughly half the present First Supreme Court District, the most logical division is to have Orleans Parish elect one Supreme Court Justice and the Parishes of Jefferson, St. Bernard and Plaquemine together elect the other Supreme Court Justice. If plaintiffs' plan were to be carried out, plaintiffs contend the present First Supreme Court District encompassing only Orleans Parish would then have a black population and voter registration comprising a majority of the district's population. More specifically, plaintiffs assert presently 124,881 of the registered voters in Orleans are white, comprising 47.9% of the plaintiffs' proposed district's voters; while 134,492 of the registered voters in Orleans are now black, comprising 51.6% of the envisioned district's voters. The other district comprised of Jefferson, Plaquemines and St. Bernard Parishes and would have a substantially greater white population than black, according to plaintiffs' plan.

Plaintiffs seek class certification of approximately 135,000 black residents of Orleans Parish, whom plaintiffs allege suffer from diluted voting strength as a result of the present at-large election system. Additionally, plaintiffs seek a preliminary and permanent injunction against the defendants restraining the further election of Justices for the First Supreme Court District until this Court makes a determination on the merits of plaintiffs' challenge. Fur-

ther, plaintiffs seek an order requiring defendants to reapportion the First Louisiana Supreme Court in a manner which "fairly recognizes the voting strengths of minorities in the New Orleans area and completely remedies the present dilution of minority voting strength." (Plaintiffs' Complaint, p. 7). Plaintiffs also seek an order requiring compliance with the Voting Rights Act and, finally, a declaration from this Court that the Supreme Court election system violates the Voting Rights Act and the fourteenth and fifteenth amendments to the Federal Constitution.[1]

Defendants do not dispute the figures presented by plaintiffs in their amended complaint. Instead, they contend that section 2 of the Voting Rights Act of 1965, as amended, the fourteenth and fifteenth amendments to the United States Federal Constitution and 42 U.S.C. § 1983 fail to provide plaintiffs grounds upon which relief can be granted for plaintiffs' allegation of diluted black voting strength.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 DOES NOT APPLY TO THE INSTANT ACTION

Prior to 1982, section 2 of the Voting Rights Act (42 U.S.C. § 1973), "Denial or Abridgement of Rights to Vote on Account of Race or Color Through Voting Qualifications or Prerequisites," read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or

[1] Plaintiffs, earlier, sought a three judge court to hear this complaint which was denied by this Court as the terms of 28 U.S.C. § 2284 provide for a three judge court when the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body is challenged. Nowhere does § 2284 provide for convening a three judge court when a judicial apportionment is challenged.

> applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Section 2 of the Voting Rights Act was amended as a response to *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 47 (1980), in which the Supreme Court in a plurality opinion held to establish a violation of section 2 of the Voting Rights Act, minority voters must prove the contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. After *Bolden,* Congress in 1982 revised section 2 to make clear that a violation of the Voting Rights Act could be proven by showing a discriminatory effect or result alone. *United States v. Marengo County Commission,* 731 F.2d 1546 n.1 (11th Cir. 1984), *appeal dismissed, cert. denied,* 105 S.Ct. 375, 83 L.Ed.2d 311. (1984)[2] Section 2, as amended, 96 Stat. 134, now reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the rights of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown

[2] *See* S.Rep. 97-417, 97 Cong.2d Sess (1982) pp. 15-43 for a complete discussion of Congress' intent to overturn the section 2 "purposeful discrimination" requirement imposed by *Mobile v. Bolden.*

> that the political processes leading to nomination for election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to *elect representatives of their choice*. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protective class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973 (emphasis added).

Prior to the 1982 amendments to section 2, a three-judge court composed of Judges Ainsworth, West and Gordon, headed by Judge West, addressed a voting rights claim arsing[*sic*] out of the same claims of discrimination as in this case, albeit not in a section 2 context. *Wells v. Edwards*, 347 F.Supp 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In *Wells*, a registered black voter residing in Jefferson Parish, brought suit seeking a reapportionment of the judicial districts from which the seven judges of the Supreme Court of Louisiana are elected. Ms. Wells sought an injunction enjoining the state from holding the scheduled Supreme Court Justice elections and an order compelling the Louisiana Legislature to enact an apportionment plan in accordance with the "one man, one vote" principle and to reschedule the pending election. On cross motions for summary judgment, the three-judge court stated, "We hold that the concept of one-man, one vote apportionment does not apply to the judicial branch of government." 342 F. Supp. at 454. The *Wells* court took notice of *Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25

L.Ed.2d 45 (1970), in which the Supreme Court held, "Whenever a state or local government decides to select persons by popular election *to perform governmental functions*, the equal protection clause of the fourteenth amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . .", 90 S. Ct. 791, 795 (emphasis added), but distinguished its holding by outlining the special functions of judges.

The *Wells* court noted many courts' past delineations between elected officials who performed legislative or executive functions and judges who apply, but not create, law[3] and concluded:

> 'Judges do not represent people, they serve people.' Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.

347 F. Supp. at 455.

The *Wells* opinion interpreted the "one man one vote" principle prior to the 1982 amendments to section 2, which added the phrase, "[T]o elect representatives of their choice." [4] (*See* emphasis in quotation 42 U.S.C. 1973,

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[3] *See, e.g., Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) ("Manifestly, judges and prosecutors are not representative in the same sense as they are legislators or the executive. Their function is to administer the law, not to espouse a cause of a particular constituency"); *Holshouser v. Scott*, 335 F. Supp. 928 (D.D.C. 1971) ("We hold that the one man, one vote rule does not apply to state judiciary. . . ."); *Buchanan v. Rhodes*, 294 F. Supp. 860 (N.D. Ohio 1966) ("Judges do not represent people, they serve people"); *New York State Assn. of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153 (S.D. N.Y. 1967) ("The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government.")

[4] This language did not appear in section 2 at the time of the *Wells* opinion.

supra.) The legislative history of the 1982 Voting Rights Act amendments does not yield a definitive statement noting why the word "representative" was added to section 2. However, in this case, no such statement is necessary, as "to elect representatives of their choice" is clear and unambiguous.

Judges, by their very definition, do not represent voters but are "appointed [or elected] to preside and to administer the law." *Black's Law Dictionary*, 1968. As statements by Hamilton in the *Federalist*, No. 78 reflect, the distinction between Judge and representative has long been established in American legal history:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. . . .

Indeed, our Federal Constitution recognizes the inherent difference between representatives and judges by placing the federal judiciary in an entirely different category from that of other federal elective offices. It is noteworthy that articles 1 and 2, which establish Congress and the Presidency, are lengthy and detailed, while Article 3,

which establishes the judiciary, is brief and free of direction, indicating the judiciary is to be free of any instructions. Today, Fifth Circuit jurisprudence continues to recognize the long established distinction between judges and other officials. *See, e.g., Morial v. Judiciary Committee of State of Louisiana*, 565 F.2d 295 (5th Cir. 1977) *en banc, cert. denied*, 435 U.S. 1013, 98 S.Ct. 1887 (1978). (See also Footnote 1, *supra*.)

The legislative history of the Voting Rights Act Amendments does not address the issue of section 2 applying to the judiciary,[5] indeed, most of the discussion concerning the application of the Voting Rights Act refers to legisla-

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[5] The Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, Senator Orrin Hatch, in voicing his strong opposition of the Legislative reversal of *Bolden* through the section 2 revisions, made a brief reference to section 2 applying to judicial elections:

> Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of section 2. It is important to emphasize at the onset that for the purposes of Section 2, the term "political subdivision" encompasses all governmental units, including city and county councils, school boards, judicial districts, utility districts, as well as state legislatures.

S. Rep. 97-417, 97 Cong. 2d Sess. 127, 151, *reprinted in* in 1982 U.S. Code Cong. & Admin. News 298, 323.

Although Senator Hatch's comment indicates coverage of judicial districts by the Voting Rights Act, the purpose of the above passage was to illustrate Senator Hatch's belief that the impact of the section 2 Amendments' "results test" would be far ranging and in his opinion, detrimental. Senator Hatch's comments were included at the end of the Senate report usually reserved for dissenting Senators. The above passage did not portend to be a definative or even a moderately detailed description of the coverage of the Voting Rights Act, nor does Senator Hatch provide any authority for his suggestion of the potential scope of section 2. Rather, this Court finds that the passage was meant to be argumentative and persuasive, and not as a means to define actual scope of the Act.

tive offices. Nevertheless plaintiffs ignore the historical distinction between representative and judge and the lack of any discernible legislative history in their favor and argue that the Voting Rights Act is a broad and remedial measure which must be extended to cover judicial election systems.[6] Plaintiffs rely principally on *Haith v. Martin*, 618 F. Supp. 410 (D.N.C. 1985) (three-judge court), *aff'd*, without opinion, 106 S.Ct. 3268, 93 L.Ed.2d 559 (1986) for the proposition that the Court should ignore *Wells v. Edwards, supra*, and apply section 2 to the allegations contained in their complaint.[7] In *Haith*, the district court held that judicial election systems are covered by section 5 of the Voting Rights Act, which requires preclearance by the U.S. Justice Department of any voting procedures changes in areas with a history of voting discrimination. Plaintiffs, in essence, argue that because the Supreme Court, without opinion, affirmed the *Haith* district court in its application of section 5 to judicial elections, this Court should expand the holding of *Haith* to include section 2 of the Voting Rights Act. Plaintiffs' argument fails because section 5 does not specifically restrict its applica-

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[6] *See e.g., United Jewish Organization of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) ("It is apparent from the face of the Act, from its legislative history, and from our cases of the Act itself was broadly remedial in the sense that it 'was designed by Congress to banish the blight of racial discrimination in voting . . .' "), 130 U.S. at 156; *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803 (1966) (The Voting Rights Act "reflects Congress' firm intention to rid the country of racial discrimination in voting"), 383 U.S. at 315.

[7] Plaintiffs also rely on *Kirksey v. Allain*, Civ. Act. No. J85-0960(B), slip op. (S.D. MS. April 1, 1987), in which a district court dismissed the reasoning in *Wells*, and held section 2 does apply to the elected judiciary. *Wells, supra*, has precedential authority and clearly conflicts with *Kirksey*, an untested lower court opinion.

tion to election systems pertaining to representatives, a restriction included in the 1982 amendments to section 2.

Although a potential conflict may develop between the holdings in *Wells* and *Haith*, *Wells* clearly states the "one man one vote" principle is *not* applicable to judicial elections. This Court recognizes the long standing principle that the judiciary, on all levels, exists to interpret and apply the laws, that is, judge the applicability of laws in specific instances. Representatives of the people, on the other hand, write laws to encompass a wide range of situations. Therefore, decisions by representatives must occur in an environment which takes into account public opinion so that laws promulgated reflect the values of the represented society, as a whole. Judicial decisions which involve the individual or individuals must occur in an environment of impartiality so that courts render judgments which reflect the particular facts and circumstances of distinct cases, and not the sweeping and sometimes undisciplined winds of public opinion.

PLAINTIFFS' FOURTEENTH AND FIFTEENTH AMENDMENT CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS PLAINTIFFS DO NOT PLEAD DISCRIMINATORY INTENT

The appropriate constitutional standard for establishing a violation of the fourteenth amendment in the context of voting rights is "purposeful discrimination." *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); [8] *McMillian v. Escambia City, Fla*, 688 F.2d 960 (5th Cir.

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[8] In *Village of Arlington Heights v. Metropolitan Housing Corp.*, purposeful discrimination was held the standard necessary to establish a violation of the fourteenth amendment where plaintiff claimed a village rezoning decision was racially discriminatory.

1982).[9] Similarly, *City of Mobile, Alabama v. Bolden, supra*, requires a court to establish a finding of discriminatory purpose before declaring a fifteenth amendment violation of voting rights.[10]

In *Voter Information Project*, 612 F.2d 208 (5th Cir. 1980), a panel composed of Judges Jones, Brown and Rubin (opinion by Judge Brown) held a suit that alleged the at-large scheme for electing city judges in Baton Rouge invidiously diluted the voting strength of black persons in violation of the fourteenth and fifteenth amendments to the United States Federal Constitution, and 42 U.S.C. § 1983, could not be dismissed when the complaint alleges purposeful discrimination. At the trial level, Judge West relied on his reasoning in *Wells, supra*, that the one man,

[9] In *McMillian v. Escambia City, Fla.*, the Fifth Circuit held the *Arlington Heights'* "purposeful discrimination" standard is appropriate in fourteenth amendment voter discrimination claims.

[10] Although there is a conflict between the requirement of "discriminatory effect" in Section 2, which is intended to enforce the fifteenth amendment, and the requirement of "purposeful discrimination" for a fifteenth amendment violation standing alone, the Senate Judicary Committee addressed this point and recognized Congress' limited ability to adjust the burden of proving Voting Rights Violations in its "Voting Rights Act Extension" Committee Report.

> Certainly, Congress cannot overturn a substantive interpretation of the Constitution by the Supreme Court. Such rulings can only be altered under our form of government by constitutional amendment or by a subsequent decision by the Supreme Court.
>
> Thus Congress cannot alter the judicial interpretations in *Bolden* of the fourteenth and fifteenth amendments by simple statute. But the proposed amendment to Section 2 does not seek to reverse the court's constitutional interpretation.

S.Rep. 97-417, 97 Cong. 2d Sess. (1982), p. 41.

The Supreme Court, the only body empowered to interpret the Federal Constitution, has not seen fit to overrule its repeated determination that the fourteenth and fifteenth amendment claims require "purposeful discrimination."

one vote principle did not apply to the elections of judges, and dismissed plaintiffs' suit. Judge Brown reversed, holding that the "one man, one vote" principle as espoused in *Wells, supra*, was not enough to dismiss plaintiff's complaint. The *Voter Information Court* found:

> The problem with the District Court's opinion, however, is that it assumes the "one man, one vote" principle was the exclusive theory of plaintiff's complaints. In addition to a rather vaguely formulated "one man, one vote" theory, plaintiffs contend that both in design and operation, the at-large schemes dilute the voting strength of black citizens and prevent blacks from being elected as judges. As the complaint attacking the city judge election system alleges:
>
> 25. The sole purpose of the present at-large system of election of City Judge is to insure that the white majority will continue to elect all white persons for the offices of City Judge.
>
> 26. The present at-large system was instituted when "Division B" was created as a reaction to increasing black voter registration and for the express purpose of diluting and minimizing the effect of the increased black vote.
>
> 27. In Baton Rouge, there is a continuing history of "bloc voting" under which when a black candidate opposes a white candidate, the white majority consistently casts its votes for the white candidate, irrespective of the relative qualifications.

Plaintiffs contend that since most of the black population of Baton Rouge and E. Baton Rouge Parish is concentrated in a few geographic areas, black citizens

could, under a single member district plan, elect at least some black judges.

612 F.2d at 211.

The *Voter Information Project* Court held the plaintiff's complaint contained sufficient allegations of intentional discrimination against black voters to survive a motion to dismiss: "If plaintiffs can prove that the purpose and operative effect of such purpose of the at-large election schemes in Baton Rouge is to dilute the voting strength of black citizens, then they are entitled to some form of relief." 612 F.2d at 212. Thus, the *Voter Information Project* requires that "purpose and operative effect" be pled in a fourteenth and fifteenth amendment challenge to a judicial apportionment plan.

The complaint in the instant case states, in pertinent part:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any black elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

(See Plaintiffs' Complaint, p.5). Later on, the Complaint alleges:

> The defendants actions are in violation of the Fourteenth and Fifteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 in that the purpose and effect of their actions is to dilute, minimize, and cancel the voting strength of the plaintiffs.

(*Id.*, p. 6.)

Although "purpose and effect" language in the second quotation above broadly read may imply plaintiffs' intention to plead discriminatory intent, it is this Court's considered opinion, based on the complaint as a whole, that plaintiffs intend to prove this claim based on a theory of "discriminatory effect" and not on a theory of "discriminatory intent." *City of Mobile Alabama v. Bolden, supra.* For example, plaintiffs' complaint does not allege the system by which the Louisiana Supreme Court Justices are elected was instituted with specific intent to discriminate. This contrasts with the specific allegations in *Voter Information Project, supra.* Accordingly, plaintiffs lack the requisite allegations in order to prove a violation of the fourteenth or fifteenth amendment to the Federal Constitution. The Court reserves the right for plaintiffs to reurge its fourteenth and fifteenth amendment claims as they relate to the Court's ruling that plaintiffs' complaint only alleges "discriminatory effect."

Accordingly, unless plaintiffs' complaint is amended within ten (10) days of the entry of this opinion, the Clerk of Court is directed to enter judgment DISMISSING plaintiffs' claim at their cost.

New Orleans, Louisiana, this 1st day of May, 1987.

/s/ CHARLES SCHWARTZ, JR.
Charles Schwartz, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3463

RONALD CHISOM, ET AL., PLAINTIFFS-APPELLANTS

versus

EDWIN EDWARDS, ET AL., DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF LOUISIANA

February 29, 1988

Before BROWN, JOHNSON, and HIGGINBOTHAM, Circuit Judges. JOHNSON, Circuit Judge:

Plaintiffs, black registered voters in Orleans Parish, Louisiana, raise constitutional challenges to the present system of electing Louisiana Supreme Court Justices from the First Supreme Court District. Plaintiffs allege that the current at-large system of electing Justices from the First District impermissibly dilutes the voting strength of black voters in Orleans Parish in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982 and the fourteenth and fifteenth amendments. The district court dismissed the section 2 claim pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, finding that section 2 does not apply to the election of state judges. Concluding that section 2 does so apply, we reverse.

The primary issue before this Court is whether section 2 of the Voting Rights Act applies to state judicial elections.

I. FACTS AND PROCEDURAL HISTORY

The facts are undisputed. Currently, the seven Justices on the Supreme Court of Louisiana are elected from six geographical judicial districts. Five of the six districts elect one Justice each. However, the First District, comprised of four parishes (Orleans, St. Bernard, Plaquemines, and Jefferson Parishes), elects two Justices at-large.

The population of the four parish First Supreme Court District is approximately thirty-four percent black and sixty-three percent white. The registered voter population reveals a somewhat similar percentage breakdown, with approximately thirty-two percent black and sixty-eight percent white. Over half of the four parish First Supreme Court District's population and over half of the district's registered voters live in Orleans Parish. Importantly, Orleans Parish has a fifty-five percent black population and a fifty-two percent black registered voter population. Plaintiffs seek a division of the First District into two single-member districts, each to elect one Justice. Under the plaintiffs' plan of division, one proposed district would be composed of Orleans Parish with a greater black population and black registered voter population than white. The other proposed district would be composed of Jefferson, Plaquemines, and St. Bernard Parishes; this district would have a substantially greater white population and white registered voter population than black. It is particularly significant that no black person has ever been elected to the Louisiana Supreme Court, either from the First Supreme Court District or from any one of the other five judicial districts.

To support their voter dilution claim, plaintiffs cite, among other factors, a history of purposeful official discrimination on the basis of race in Louisiana and the existence of widespread racially polarized voting in elections involving black and white candidates. Specifically, plaintiffs allege in their complaint:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any blacks elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Surpreme Court Justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

On May 1, 1987, the district court dismissed plaintiffs' complaint for failure to state a claim upon which relief may be granted. In its opinion accompanying the dismissal order, the district court concluded that section 2 of the Voting Rights Act does not apply to the election of state judges. To support this conclusion, the district court relied primarily on the amended language in section 2 which states "to elect representatives of their choice." The district court reasoned that since judges are not "representatives," judicial elections are therefore not within the protective ambit of section 2. Focusing on a perceived inherent difference between representatives and judges, the district court stated, "[j]udges, by their very definition, do not

represent voters but are 'appointed [or elected] to preside and administer the law.' " (citation omitted). The district court further relied on what was understood to be a lack of any reference to judicial elections in the legislative history of section 2, and on previous court decisions establishing that the "one person, one vote" principle does not apply to judicial elections. As to plaintiffs' fourteenth and fifteenth amendment challenges, the district court determined that plaintiffs had failed to plead an intent to discriminate with sufficient specificity to support their constitutional claims. Plaintiffs appeal the district court's dismissal of both their statutory and constitutional claims.

In an opinion just released, the Sixth Circuit, addressing a complaint that the present system of electing municipal judges to the Hamilton County Municipal Court in Ohio violates section 2, concluded that section 2 does indeed apply to the judiciary. Mallory v. Eyrich, No. 87-3838, slip op. (6th Cir. Feb. 12, 1988). Other than our district court, only two district courts have ruled on the coverage of section 2 in this context. The Mallory district court, subsequently reversed, concluded that section 2 does not extend to the judiciary. Mallory v. Eyrich, 666 F. Supp. 1060 (S.D. Ohio 1987). The other district court, Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987), determined that section 2 does apply to the judicial branch. After consideration of the language of the Act itself; the policies behind the enactment of section 2; pertinent legislative history; previous judicial interpretations of section 5, a companion section to section 2 in the Act; and the position of the United States Attorney General on this issue; we conclude that section 2 does apply to the election of state court judges. We therefore reverse the judgment of the district court.

II. DISCUSSION

A. The Plain Language of the Act

The Voting Rights Act was enacted by Congress in 1965 for a broad remedial purpose—"to rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966). Since the inception of the Act, the Supreme Court has consistently interpreted the Act in a manner which affords it "the broadest possible scope" in combatting racial discrimination. Allen v. State Board of Elections, 393 U.S. 544, 565 (1969). As a result, the Act effectively regulates a wide range of voting practices and procedures. *See* United States v. Sheffield Board of Commissioners, 435 U.S. 110, 122-23 (1978). Referred to by the Supreme Court as a provision which "broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds," Katzenbach, 383 U.S. at 316, section 2 of the Voting Rights Act of 1965, prior to its amendment in 1982, provided as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress amended section 2 in 1982 in response to the Supreme Court's decision in Mobile v. Bolden, 446 U.S. 55 (1980), wherein the Court concluded that section 2 operated to prohibit only intentional acts of discrimination by state officials. Thereafter, Congress, in disagreement with the high court's pronouncement, amended section 2 with language providing that proof of intent is not required to successfully prove a section 2 violation. In-

stead, Congress adopted the "results" test, whereby plaintiffs may prevail under section 2 by demonstrating that, under the totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race. However, while effecting significant change through the 1982 amendments, Congress specifically retained the operative language or original section 2 defining the section's coverage —"[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed. . . ." Section 2, as amended in 1982, now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class

elected in numbers equal to their proportion in the population.

Section 14(c)(1), which defines "voting" and "vote" for purposes of the Act, sets forth the types of election practices and elections which are encompassed within the regulatory sphere of the Act. Section 14(c)(1) states,

> The terms "vote" of "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Clearly, judges are "candidates for public or party office" elected in a primary, special, or general election; therefore, section 2, by its express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act.[1]

In Dillard v. Crenshaw County, 831 F. 2d 246 (11th Cir. 1987), the Eleventh Circuit addressed the issue of the coverage of section 2. In Dillard, the court rejected the defendant county's implicit argument that the election of an at-large chairperson of a county commission was not covered by section 2 due to that position's administrative, as opposed to legislative, character. The Dillard court stated,

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official. The language is only and uncompromisingly premised on the face of nomination or election. Thus, on the face of Section 2 it is irrelevant that the chairperson performs only administrative and executive duties. It is only relevant that Calhoun County has expressed an interest in retaining the post as an electoral position. Once a post is open to the electorate, and if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.

[1] Evidence of congressional intent to reach all types of elections, regardless of who or what is the object of the vote, is the fact that votes on *propositions* are within the purview of the Act. Section 14(c)(1).

Id. at 250.

The State asserts that by amending section 2 in 1982, Congress intentionally grafted a limitation on section 14(c)(1) that "candidates for public or party office" only include "representatives"; since judges are not "representatives," state judicial elections are exempt from the protective measures of the Act. In making this contention, the State, as well as the district court, points to the distinctive functions of judges as opposed to other elected officials. Specifically, the district court, citing Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973), notes that the "one person, one vote" principle of apportionment has been held not to apply to the judicial branch of government on the basis of this distinction. *See also* Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980). In Wells, the plaintiff sought reapportionment of the Louisiana Supreme Court Judicial Districts in accordance with one person, one vote principles. The Wells court rejected the plaintiff's claim, reasoning that the "primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constitutents." Wells, 347 F. Supp. at 455. The district court then concluded that since judges do not rep-

resent, but instead serve people, the rationale behind one person, one vote apportionment of preserving a representative form of government is not relevant to the judiciary. *Id.*

In Voter Information, this Court, bound by the holding in Wells due to the Supreme Court's summary affirmance of that decision, rejected the plaintiffs' claim for reapportionment of judicial districts on the one person, one vote theory. Voter Information, 612 F.2d at 211. However, the Voter Information Court then emphasized that the plaintiffs further asserted claims of racial discrimination under the fifteenth amendment which resulted in the dilution of black voting strength. Recognizing the difference between the two types of claims, the Court expressly rejected the applicability of the Wells decision to claims of racial discrimination, stating,

> [T]he various 'one man one vote' cases involving Judges make clear that they do not involve claims of race discrimination as such.
>
> To hold that a system designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments. The Supreme Court has frequently recognized that election schemes not otherwise subject to attack may be unconstitutional when designed and operated to discriminate against racial minorities.

Id. (footnote omitted).

We, like the Voter Information Court, are bound by the Supreme Court's affirmance of Wells and its holding that the one person, one vote principle does not extend to the judicial branch of government. However, the district court's reliance on Wells in the instant case is misplaced as

we are not concerned with a complaint seeking reapportionment of judicial districts on the basis of population deviations between districts. Rather, the complaint in the instant case involves claims of racial discrimination resulting in vote dilution under section 2 of the Voting Rights Act and the fourteenth and fifteenth amendments. Therefore, the district court erred to the extent it relied on Wells in support of its conclusion that section 2 does not apply to the judiciary.[2]

The Voting Rights Act was enacted, in part, to facilitate the enforcement of the guarantees afforded by the Constitution. Indeed, section 2, as originally written, no more than elaborated on the fifteenth amendment, providing statutory protection consonant with that of the constitutional guarantee. Mobile, 446 U.S. at 60. Therefore, the reasoning utilized by the Court in Voter Information to extend the protection from racial discrimination provided by the fourteenth and fifteenth amendments to the judiciary compels a conclusion by this Court that the protection from racial discrimination provided by section 2 likewise extends to state judicial elections.

It is difficult, if not impossible, for this Court to conceive of Congress, in an express attempt to expand the

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[2] The distinction between equal protection principles applicable to claims based on one person, one vote principles of apportionment and those based on racial discrimination is not without prior Supreme Court precedent. *See* White v. Regester, 412 U.S. 755 (Court reversed decision of district court that reapportionment plan for Texas House of Representatives violated one person, one vote principles, but affirmed the district court's conclusion that a particular portion of the plan unlawfully diluted minority voting strength.). *See also* Gaffney v. Cummings, 412 U.S. 735, 751 (1973) ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.' ") (citations omitted).

coverage of the Voting Rights Act, to have in fact amended the Act in a manner affording minorities less protection from racial discrimination than that provided by the Constitution. We conclude today that section 2 as amended in 1982, provides protection commensurate with the fourteenth and fifteenth amendments; therefore, in accordance with this Court's decision in Voter Information, section 2 necessarily embraced judicial elections within its scope. Any other construction of section 2 would be wholly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending section 2; that is, to expand the protection of the Act.

B. The Legisiative History of Section 2

Our conclusion today finds further support in the legislative history of the 1982 amendments to section 2. An overriding principle which guides any analysis of the legislative history behind the Voting Rights Act is that the Act must be interpreted in a broad and comprehensive manner in accordance with congressional intent to combat racial discrimination of any kind in all voting practices and procedures. Thus, in the absence of *any* legislative history warranting a conclusion that section 2 does not apply to state judicial elections, the only acceptable interpretation of the Act is that such elections are so covered. *See* Sheffield, 435 U.S. 110.[3]

[3] In Sheffield, the Supreme Court declined to adopt a narrowing construction of § 5 and the preclearance requirements of the Act whereby § 5 would cover only counties and political units that conduct voter registration. "[I]n view of the structure of the Act, it would be unthinkable to adopt the District Court's construction unless there were persuasive evidence either that § 5 was intended to apply only to changes affecting the registration process or that Congress clearly manifested an intention to restrict § 5 coverage. . . ." 435 U.S. at 122.

As previously noted, Congress amended section 2 in direct response to the Supreme Court's decision in Mobile v. Bolden,

> The Senate Report states that amended [section] 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to our decision in Mobile v. Bolden. . . . Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, ___ U.S. ___, 106 S. Ct. 2752 , 2763 n.8 (1986) (citations omitted). In amending section 2, Congress preserved the operative language of subsection (a) defining the coverage of the Act and merely added subsection (b) to adopt the "results test" for proving a violation of section 2. In fact, the language added by Congress in subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived almost verbatim from the Supreme Court's standard governing claims of vote dilution on the basis of race set forth in White v. Regester, 412 U.S. 755 (1973), prior to Mobile v. Bolden. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 205 (Congress' stated purpose in adding subsection (b) was to "embod[y] the test laid down by the Supreme Court in White."). In White, the Court stated "[t]he plaintiffs' burden is to produce evidence . . . that [the minority groups'] members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766.[4]

[4] It might be argued that since the Supreme Court used the term "legislators" and Congress chose "representatives," Congress thereby rejected language limiting the coverage of § 2 to legislators. The better

Further, contrary to the statement in the district court's opinion that the legislative history of the 1982 amendments does not address the issue of section 2 applying to the judiciary, Senator Orrin Hatch, in comments contained in the Senate Report, stated that the term " 'political subdivision' encompasses all governmental units, including city and county councils, school boards, *judicial districts*, utility districts, as well as state legislatures." S. Rep. 417 at 151 (emphasis added). While the above statement by Senator Hatch is not a definitive description of the scope of the Act, we believe the statement provides persuasive evidence of congressional understanding and belief that section 2 applies to the judiciary, especially since the Report is silent as to any dissent by senators from Senator Hatch's description.

Additionally, the Senate and House hearings on the various bills regarding the extension of the Voting Rights Act in 1982 are replete with references to the election of judicial officials under the Act. The references primarily occur in the context of statistics presented to Congress indicating advances or setbacks of minorities under the Act. The statistics chart the election of minorities to various elected positions, including judges. *See Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, and H.R. 3112, H.R. 3198, H.R. 3473 and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution*

analysis is that Congress did not use the term "representatives" with a specific intent to limit the section's application to any elected officials. Had Congress wished to do so, it could have easily promulgated express language to effectuate that intent.

of the Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 669, 748, 788-89 (1982). Once again, the legislative history does not reveal any dissent from the proposition that such statistics were properly considered by Congress in amending the Act. Finally, throughout the Senate Report on the 1982 amendments to section 2, Congress uses the terms "officials," "candidates," and "representatives" interchangeably when explaining the meaning and purpose of the Act. This lack of any consistent use of the term "representatives" indicates that Congress did not intentionally choose that term in an effort to exclude certain types of elected officials from the coverage of the Act.

In contrast to the examples of legislative history which plaintiffs cite in support of their position that section 2 applies to state judicial elections, the State offers no convincing evidence in the legislative history contrary to the plaintiff's interpretation of the Act. Instead, the State relies primarily on the plain meaning of the word "representative" to assert that judges are exempt from the Act. The State's position is untenable.[5] Judges, while not "representatives"

[5] The State asserts that the Dole compromise prohibiting proportional representation evidences congressional intent that § 2 only apply to legislative officials. Proportional representation, the State continues, is relevant to the legislature; therefore, Congress intended § 2 to apply only to the election of legislators. However, what belies the State's argument is that proportional representation may occur in any election wherein the people elect individuals to comprise a group. For instance, Louisiana elects seven Justices to comprise the Supreme Court. Certainly, the prohibition on proportional representation in § 2(b) applies in such a situation to prevent a legal requirement that the number of blacks on the Louisiana Supreme Court correspond to the percentage of blacks in the Louisiana population. Moreover, the State conceded at oral argument that executive officials could be covered by § 2, underlying their assertion that congressional fear of proportional representation evidenced intent that § 2 only apply to the legislature.

in the traditional sense, do indeed reflect the sentiment of the majority of the people as to the individuals they choose to entrust with the responsibility of administering the law. As the district court held in Martin v. Allain:

> [J]udges do not "represent" those who elect them in the same context as legislators represent their constituents. The use of the word "representatives" in Section 2 is not restricted to legislative representatives but denotes anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges.

658 F. Supp. at 1200.

C. *Section 5 and Section 2*

The plaintiffs further support their position that judicial elections are covered by section 2 by citing to the recent case of Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, ___ U.S. ___, 106 S. Ct. 3268 (1986), wherein the district court held that judicial elections are covered by section 5 and the preclearance requirements of the Act. In Haith, the defendant state officials sought to exempt the election of superior court judges in North Carolina from the preclearance requirements of section 5 by relying on the cases holding that the one person, one vote principle does not apply to the judicial branch of government. In an analysis strikingly similar to that employed by the Court in Voter Information, the district court in Haith rejected the defendants' arguments as misplaced due to the fact that the plaintiff's claim was one based on discrimination, not malapportionment. The Haith court stated "[a]s can be seen, the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413. *See also* Kirksey v. Allain, 635 F. Supp. 347, 349 (S.D. Miss. 1986) ("Given

the expansive interpretation of the Voting Rights Act and § 5, this Court is compelled to agree with the pronouncement in Haith v. Martin" that section 5 applies to the judiciary.).

In the instant case, the State argues that the Supreme Court's affirmance of Haith does not compel a conclusion that section 2 applies to judicial elections as section 5 involves the mechanics of voting, while section 2 involves the fundamental right to vote for those who govern. We reject this asserted distinction. If, for instance, Louisiana were to enact an election statute providing that no blacks would be able to vote in elections for Louisiana Supreme Court Justices, it is undisputed, after Haith, that such a statute would be invalidated under the preclearance requirements of section 5. To hold, as the State asserts, that such an egregious statute would not be subject to the requirements of section 2 as well would lead to the incongruous result that, while Louisiana could not adopt such a statute in 1988, if that statute were in effect prior to 1982, minorities could only challenge the statute under the Constitution and not the Voting Rights Act. Such a result would be totally inconsistent with the broad remedial purpose of the Act. Moreover, section 5 and section 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices originate in the past, present, or future. Section 5 contains virtually identical language defining its scope to that of section 2—"any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. . . ." Therefore, statutory construction, consistency, and practicality point inexorably to the conclusion that if section 5 applies to the judiciary, section 2 must also apply to the judiciary. *See* Pampanga Mills v. Trinidad, 279 U.S. 211, 217-218 (1929).

D. *The Attorney General's Interpretation*

In United States v. Sheffield Board of Commissioners, 435 U.S. at 131, the Supreme Court concluded that the contemporaneous construction of the Act by the Attorney General is persuasive evidence of the original congressional understanding of the Act, "especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." Since its inception, the Attorney General has consistently supported an expansive, not restrictive, construction of the Act. Testifying at congressional hearings prior to the passage of the Act in 1965, the Attorney General stated that "every election in which registered voters are permitted to vote would be covered" by the Act. *Voting Rights: Hearing Before Subcomm. No. 5 of the House Judiciary Comm.*, 89th Cong. 1st Sess. (1965), at 21. *See also* Allen, 393 U.S. at 566-67. Continuing the trend of broadly interpreting the Act to further its remedial purpose, the Attorney General has filed an amicus curiae brief in the instant case in which he maintains that the "plain meaning of [the language in section 2] reaches all elections, including judicial elections" and that the preexisting coverage of section 2 was not limited by the 1982 congressional amendments. This construction of the Act by the Attorney General further bolsters our holding today that section 2 does apply to state judicial elections.

E. *Plaintiffs' Constitutional Claims*

Plaintiffs also appeal the district court's dismissal of their constitutional claims for failure to plead specific discriminatory intent. In their complaint, plaintiffs allege, in pertinent part:

> The defendant's actions are in violation of the Fourteenth and Fifteenth amendments to the United States Constitution and 42 U.S.C. Section 1983 in that the purposes and effect of their actions is to dilute, minimize, and cancel the voting strength of the plaintiffs.

In the instant case, the district court was correct in concluding that discriminatory purpose is a prerequisite to recovery under the fourteenth and fifteenth amendments. *See* Washington v. Davis, 426 U.S. 229, 239-241 (1976). However, the district court erred in finding that plaintiffs' complaint did not establish a theory of "discriminatory intent." In Voter Information, this Court held that if "plaintiffs can prove that the purpose and operative effect of such purpose" of the challenged electoral practices is to dilute minority voting strength, the plaintiffs are entitled to some form of relief. Voter Information, 612 F.2d at 212. When compared with the complaint in Voter Information, the plaintiffs' complaint in the instant case is sufficient to raise a claim of racial discrimination under the fourteenth and fifteenth amendments.[6]

III. *CONCLUSION*

Where racial discrimination exists, it is not confined to elections for legislative and executive officials; in such in-

---

[6] In Voter Information, the plaintiffs' complaint alleged,

> 25. The sole purpose of the present at-large system of election of City Judge is to ensure that the white majority will continue to elect all white persons for the office of City Judge.
>
> 26. The present at-large system was instituted when "Division B" was created as a reaction to increasing black voter registration and for the express purpose of diluting and minimizing the effect of the increased black vote.
>
> 27. In Baton Rouge, there is a continuing history of "bloc voting" under which when a black candidate opposes a white candidate, the white majority consistently casts its votes for the white candidate, irrespective of relative qualifications.

612 F.2d at 211.

stance, it extends throughout the entire electoral spectrum. Minorities may not be prevented from using section 2 in their efforts to combat racial discrimination in the election of state judges; a contrary result would prohibit minorities from achieving an effective voice in choosing those individuals society elects to administer and interpret the law. The right to vote, the right to an effective voice in our society, cannot be impaired on the basis of race in any instance wherein the will of the majority is expressed by popular vote.

For the reasons set forth above, we reverse the judgment of the district court and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-4075
Section A

RONALD CHISOM, ET AL., PLAINTIFFS,

UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR,

v.

CHARLES E. ROEMER, GOVERNOR OF THE STATE OF LOUISIANA; WALTER McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA; JERRY FOWLER, COMMISSIONER OF ELECTIONS OF THE STATE OF LOUISIANA, DEFENDANTS.*

COMPLAINT IN INTERVENTION

The United States of America alleges:

1. The Attorney General files this complaint in intervention, on behalf of the United States, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, Sections 2 and 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973 and 1973j(d) and pursuant to 28 U.S.C. 2201. This lawsuit is filed to seek redress for a denial of "equal protection of the laws . . . on account of race, color, re-

---

* At the time the original complaint in this matter was filed Edwin Edwards was Governor of the State of Louisiana and James H. Brown was Secretary of State. Pursuant to Rule 25, Federal Rules of Civil Procedure, the current governor and secretary of state are substituted automatically as parties.

ligion, sex or national origin" and to otherwise enforce rights guaranteed by the Fourteenth and Fifteenth Amendments. 42 U.S.C. 2000h-2.

2. The Attorney General has certified that this case is of "general public importance," within the meaning of Title IX. 42 U.S.C. 2000h-2. The certificate of the Attorney General is appended to this complaint and is incorporated herein.

3. This Court has jurisdiction of this action pursuant to 42 U.S.C. 1793j(f) and 28 U.S.C. 1345.

4. Defendant Charles E. Roemer is the Governor of the State of Louisiana and is responsible under the state's constitution for the execution of the laws of the state including those laws affecting the election of members of the Louisiana Supreme Court. Defendant Walter McKeithen is the Secretary of State of the State of Louisiana and, pursuant to the state constitution, is the chief election officer of the state. Defendant Jerry Fowler is the Commissioner of Elections of the State of Louisiana and is charged with the responsibility to administer various election laws including those related to voter registration and the eligibility to vote in elections for the supreme court. Each defendant is sued in his official capacity.

5. According to the 1980 Census, the State of Louisiana had a population of 4,205,900 of whom 1,238,241 (29.44%) were black persons. The census further indicated that there are 2,875,432 persons eighteen (18) years of age and older (voting age population) of whom 766,187 (26.44) were black persons.

6. Pursuant to state law, the Louisiana Supreme Court consists of seven members. The members of the court are elected in public elections and serve terms of ten years. For purposes of electing supreme court justices, the state is divided into five single-member election districts and one multi-member election district; the multi-member district

is labeled the First Supreme Court District and elects two members to the court. The First Supreme Court District consists of Jefferson, Orleans, Plaquemines and St. Bernard Parishes.

7. Orleans Parish contains the largest population of any parish in the State of Louisiana and also the largest number of black citizens in any parish. A majority of those persons residing in Orleans Parish are black persons. The multi-member supreme court district used in this area of the state, however, combines majority black Orleans Parish with three other, heavily-white, parishes in such a manner that black citizens comprise approximately one third of the total population of the district and approximately thirty percent of the voting age population of the district.

8. Elections, including those for judicial offices, conducted in the parishes which constitute the First District are characterized by a pattern of racially polarized voting.

9. The State of Louisiana has a history of official discrimination that has touched the right of black citizens to register, to vote and otherwise to participate in the political process.

10. Black citizens who reside in the First District bear the effects of discrimination in education, employment and health, which hinders their ability to participate in the political process.

11. If the members of the supreme court were elected pursuant to a plan utilizing single-member district exclusively, it is likely that black citizens residing in the Orleans Parish area would constitute the majority of the citizens residing in one district.

12. No valid state interest is served by the incorporation of a multi-member district into the otherwise single-member district election plan, particularly in light of the disparate racial impact of the multi-member feature.

13. The incorporation of the multi-member district in the State of Louisiana's method for electing members of its supreme court is a standard, practice or procedure which, within the context of the totality of the circumstances described in the preceding paragraphs, results in a denial or abridgment of the right to vote on account of race or color in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

WHEREFORE, the United States prays that the Court enter a judgment:

a) Declaring that the incorporation of the multi-member district in the election plan for the Louisiana Supreme Court is violative of Section 2 of the Voting Rights Act, 42 U.S.C. 1973;

b) Enjoining the defendants, their agents and successors in office, and all persons acting in concert with them from administering, implementing or conducting any election for members of the Louisiana Supreme Court in the multi-member district presently in the election plan;

c) Ordering the defendants to devise a new election plan which corrects the multi-member district violation in a manner consistent with federal law and develop a schedule to implement the new plan and to obtain the necessary preclearance, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of the new plan and implementation schedule.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-4075
Section A

RONALD CHISOM, ET AL., PLAINTIFFS,

UNITED STATES OF AMERICA, APPLICANT FOR INTERVENTION,

v.

CHARLES E. ROEMER, GOVERNOR OF THE STATE OF LOUISIANA; WALTER McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA; JERRY FOWLER, COMMISSIONER OF ELECTIONS OF THE STATE OF LOUISIANA, DEFENDANTS.

CERTIFICATE OF THE ATTORNEY GENERAL

I hereby certify that the case of *Ronald Chisom, et al.* v. *Charles E. Roemer, et al.*, Civil Action No. 86-4075 (E.D. La.), which seeks relief from an alleged denial of equal protection of the laws based on race, color, religion, sex, or national origin, is of general public importance within the meaning of Section 902 of the Civil Rights Act of 1964.

This certificate is made pursuant to the provisions of Section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, and in support of the complaint to which it is attached.

Signed this 4th day of August 1988.

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NUMBER 86-4075

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARC MORIAL, LOUISIANA VOTER REGISTRATION/ EDUCATION CRUSADE, AND HENRY A. DILLON, III
PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFFS-INTERVENOR

versus

BUDDY ROEMER, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA; FOX McKEITHEN, IN HIS CAPACITY AS SECRETARY OF THE STATE OF LOUISIANA; AND JERRY M. FOWLER, IN HIS CAPACITY AS COMMISSIONER OF ELECTIONS OF THE STATE OF LOUISIANA
DEFENDANTS

Section A
Magistrate 6

CLASS ACTION
ANSWER

ANSWER TO COMPLAINT
[as last amended on September 30, 1986]

I.

The first sentence of Paragraph I *Preliminary Statement* needs no answer for it is merely descriptive of the parties

plaintiff. The second sentence of Paragraph I *Preliminary Statement,* which reads as follows:

> Plaintiffs contend that the present system of electing judges, whereby the parish of Orleans, St. Bernard, Plaquemines, and Jefferson elect two Justices to the Louisiana Supreme Court at-large, is a violation of the 1965 Voting Rights Act, as amended, 42 U.S.C. Section 1973 because it dilutes the voting strength of plaintiffs,

is denied.

II.

Except for the last paragraph, the allegations of Paragraph II *Jurisdiction* need no answer for they are merely descriptive of the statutory grounds under which this action has been brought. As to the last sentence of Paragraph II *Jurisdiction* which reads:

> Plaintiffs' claims under the Voting Rights Act and under the Fourteenth and Fifteenth Amendments to the U.S. Constitution must be determined by a district court of three judges pursuant to 28 U.S.C. Sect. 2284 (a),

no answer is necessary, because this Court has already ruled against the assignment of this case to a three-judge court.

III.

The allegations of Paragraph III *Parties* need no answer except to show that the organizational plaintiff cannot be representative of the class of Orleans Parish black registered voters and further except to show that "Buddy Roemer" should be substituted for "Edwin Edwards" and "Mr. Roemer" for "Mr. Edwards." "Fox McKeithen"

should also be substituted for "James H. Browns," (sic) and "Mr. McKeithen" for "Mr. Brown."

IV.

Substantially all of the allegations of Paragraph IV *Class Action Allegations* need no answer for this Court has already made a class action certification; however, the organizational corporate plaintiff is not a registered voter and, therefore, is neither a member, nor representative, of the class.

V.

The allegations of Paragraph V *Facts* reflected in the first eight unnumbered sub-paragraphs are admitted. Answering the last unnumbered sub-paragraph of Paragraph V *Facts,* which reads as follows:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any blacks elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court Justices from the New Orleans area dilutes minority voting strength and therefore violates the 1966 Voting Rights Act, as amended,

defendants deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

VI.

As to the allegations of Paragraph VI *Causes of Action,* defendants deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

VII.

As to the allegations of Paragraph VII *Equity,* defendants deny each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

FOR FURTHER AND SEPARATE AFFIRMATIVE DEFENSES, DEFENDANTS SAY:

A.
First Separate Affirmative Defense

The complaint, and as amended, fails to state a claim against defendants upon which relief can be granted.

B.
Second Separate Affirmative Defense

It was not the intention of Congress, either expressed or implied, that a state court judiciary selection system be subject to the Voting Rights Act and, therefore, the Voting Rights Act is not applicable in this case.

C.
Third Separate Affirmative Defense

At all times pertinent herein plaintiffs [with the exception of the corporate plaintiff] and the Orleans black voters constituting the class have had an equal opportunity to participate in Louisiana's electoral judicial selection system and are, therefore, not entitled to any relief herein.

D.
Fourth Separate Affirmative Defense

The factual findings of *Major v. Treen,* 574 F. Supp. 325 (E.D. La. 1983), are not reflective of current conditions in Orleans Parish as they exist and have existed at all times pertinent herein.

E.
Fifth Separate Affirmative Defense

To assign one justice to Orleans Parish alone would give Orleans a disproportionate advantage over the remaining Parishes of Louisiana.

F.
Sixth Separate Affirmative Defense

As it relates to judicial elections, there is no dilution in Orleans black voter participation.

G.
Seventh Separate Affirmative Defense

If the Voting Rights Act is applied to the judiciary, then such application is violative of the Tenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

H.
Eighth Separate Affirmative Defense

The statutes and laws concerning the Louisiana judicial selection electoral system are not, in whole or in part, products of racially-discriminatory intent and thus violative of the Fourteenth and Fifteenth Amendments to the United States Constitution. Louisiana first introduced its judicial selection system in its 1852 Constitution, which predated the Fourteenth Amendment [ratified on July 21,

1868] by fifteen years and the Fifteenth Amendment [ratified on February 3, 1870 or February 17, 1870 depending on the effectiveness of New York's withdrawal of its ratification] by seventeen years. The Parishes of Orleans, St. Bernard, Plaquemines, and Jefferson have been together and, as such, have had two justices on the Louisiana Supreme Court since Louisiana's 1879 Constitution.

I.
Ninth Separate Affirmative Defense

By the creation of two districts, one for Orleans Parish and one for the Parishes of St. Bernard, Plaquemines, and Jefferson, so as to create a "black district" for a black candidate and a "white district" for a white candidate, racially safe boroughs are created for candidates. By this means two impotent minorities are created, thereby resulting in their disenfranchment [*sic*] for all practical purposes. As the numbers are alleged in plaintiffs' complaint, as amended, these disenfranchised minorities will consist of 49.16% of the total registered voters in the current First Supreme Court District. Thus, it is to the candidates and not the voters to whom relief is afforded.

J.
Tenth Separate Affirmative Defense

Judges, unlike representatives, embody within themselves the full judicial power of the state. A judge has but one constituent, the lady who is blindfolded and carries both a shield and sword.

K.
Eleventh Separate Affirmative Defense

If vote dilution is found, plaintiffs suggested limitation of a remedy, i.e., split electoral districts, is constitutionally impermissible for the State of Louisiana, through its bicameral legislature, has a vested right to consider an entirely new electoral districting scheme, as well as either an appointed judiciary, as provided for in its Constitutions of 1812, 1845, 1864, 1878, and 1898, or a merit selection plan.

L.
Twelfth Separate Affirmative Defense

Louisiana's 1974 Constitution, which, in pertinent part, provides for the judicial selection system here under attack, was precleared by the Justice Department of the United States of American on November 26, 1974 [thus after the adoption of the Voting Rights Act] except for Article VIII (10 B), which provision was subsequently precleared on June 6, 1983 [thus after the 1982 amendment to the Voting Rights Act].

M.
Thirteenth Separate Affirmative Defense

A requirement that Louisiana must gain preclearance of any judicial selection method through the Justice Department of the United States of America, an intervenor on the plaintiffs' side of this case is not judicially permissible for the Justice Department would thereby sit in the conflicting position as the final arbitrator of the matter when its avowed position in this litigation might have been judicially disapproved as this case proceeds to final judgment.

N.
Fourteenth Separate Affirmative Defense

Since most other states, where violations occur, may alter their judicial selection system without interference

from the Justice Department of the United States of America, Louisiana would not be on the same equal footing with these other states and, therefore, the Voting Rights Act, as written, and applied, in this regard violates the United States Constitution.

WHEREFORE, foregoing premises considered, upon hearing had, the demands of the plaintiffs be, and the same should be, rejected at their cost.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-4075
Section A

RONALD CHISOM, ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, INTERVENOR

versus

EDWIN EDWARDS, ET AL.

DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION

Now into Court, through undersigned counsel, come the defendants, who, for their answer to the Complaint in Intervention, admit, deny and allege as follows:

1.

The allegations of paragraph 1 need no answer for they are merely descriptive of the legal authority to which reference is made.

2.

The allegations of paragraph 2 are admitted.

3.

The allegations of paragraph 3 are admitted.

4.

The allegations of paragraph 4 are admitted.

5.

The allegations of paragraph 5 are admitted.

6.

The allegations of paragraph 6 are admitted.

7.

Defendants admit the first two sentences of paragraph 7, but deny the remaining sentence of paragraph 7.

8.

The allegations of paragraph 8 are denied.

9.

The allegations of paragraph 9 are denied. Further answering, defendants show there has been no official discrimination in the State of Louisiana for more than the last twenty-five years.

10.

The allegations of paragraph 10 are denied.

11.

The allegations of paragraph 11 are denied.

12.

The allegations of paragraph 12 are denied.

13.

The allegations of paragraph 13 are denied.

WHEREFORE, defendants pray that the foregoing answers be deemed good and sufficient and that upon hearing had the demands of the intervenor be rejected at its cost.

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Supreme Court of the United States

No. 90-757

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 18, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with 90-1032, *United States v. Charles E. Roemer, Governor of Louisiana, et al.* and a total of one hour is allotted for oral argument.

January 18, 1991

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No. 90-1032

UNITED STATES, PETITIONER

v.

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No. 90-757

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IN THE

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OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Does section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, cover elections for judicial office?

PARTIES

The following were parties in the courts below:

Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon III, and the Louisiana Voter Registration/Education Crusade, *Plaintiffs*;

The United States of America, *Plaintiff-Intervenor*;

Charles E. Roemer, in his capacity as governor of the State of Louisiana, W. Fox McKeithen, in his capacity as Secretary of State of the State of Louisiana, and Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana, *Defendants*;

Pascal F. Calogero, Jr., and Walter F. Marcus, Jr., *Defendant-Intervenors*.

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No. 90-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals remanding the case to the district court with orders to dismiss the claims under the Voting Rights Act in light of *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), is contained in the Appendix to the Petition for Certiorari [hereafter "Pet. App."], at pages 1a-3a, and is reported at 917 F.2d 187 (5th Cir. 1990). The opinion of the district court is contained in

the Pet. App. at pages 4a-64a and in the Supplemental Appendix to the Petition for Certiorari [hereafter "Supp. Pet. App."]; it is not reported. An earlier opinion of the Court of Appeals is reported at 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988). An earlier opinion of the district court is reported at 659 F. Supp. 183 (E.D. La. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1990. The petition for certiorari was filed on November 14, 1990. On January 18, 1991, this Court granted the petition for certiorari; it also consolidated this case with No. 90-1032, *United States v. Roemer*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, which provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in Section 1973(b)(f) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivison are not equally open to participation by members of a class of citizens protected by subdivision (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This case also involves section 14(c)(1) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(c)(1), which provides, in pertinent part, as follows:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office and propositions for

which votes are received in an election.

STATEMENT OF THE CASE

This case involves a challenge, under section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, to the sole multimember electoral district used to select a Justice for the Louisiana Supreme Court. Petitioners claim that the election scheme illegally dilutes the voting strength of Orleans Parish's African American voters by submerging that majority African American parish in a majority white district.

1. *The Structure of the Louisiana Supreme Court*

The Louisiana Supreme Court is the highest court of the State of Louisiana. The court has seven Justices,[1] each of whom is elected to a ten-year term. Pet. App. 7a.

The system under which justices are elected is, in all

[1]Pursuant to state law, the Louisiana Supreme Court sits *en banc* and its jurisdiction extends statewide. A single justice court may issue a writ of habeas corpus and all needful writs, orders and process in aid of the court's jurisdiction, but exercise of this authority is subject to review by the whole court. Pet. App. 8a.

essential respects, identical to the system under which other, nonjudicial state officials are selected. Justices, like nonjudicial public officials, are elected from geographically defined districts; each Justice must reside in the district from which he or she seeks election, and only voters who live in that district are eligible to vote in its judicial election. Pet. App. 7a, 8a. Candidates for the Supreme Court, like candidates for nonjudicial offices, compete in an "open primary": although party affiliation is indicated on the ballot, all candidates compete against one another. Pet. App. 7a. Elections for the Supreme Court, like elections for nonjudicial positions, are governed by a majority-vote requirement: if no candidate receives a majority of the votes cast in the open primary, the two candidates who received the most votes compete head-to-head in the general election. *Id.*

Five of the seven Justices on the Louisiana Supreme Court are elected from single-member districts. The five single-member election districts consist of between eleven and fifteen whole parishes each. The smallest of these

districts (the Fourth Supreme Court District) has a total population of 410,850; the largest (the Fifth Supreme Court District) has a total population of 861,000. Pet. App. 10a.

Two of the Justices are elected from the multi-member First Supreme Court District. Pet. App. 7a-8a. The First Supreme Court District is also the state's *only* multimember Supreme Court District. It encompasses Orleans Parish (the city of New Orleans), and three adjoining parishes, St. Bernard, Plaquemines, and Jefferson. Orleans Parish has a slight African American majority both in total population and in registered voters. Pet. App. 10a, 11a. The other three parishes are all overwhelmingly white both in total population and in registered voters. *Id.* Overall, then, the First Supreme Court District has a substantial white majority in both population and registered voters. *Id.* Elections for the two Supreme Court positions from the First Supreme Court District are not conducted in the same year. Rather, the two terms are staggered. Pet. App. 8a.

The Louisiana Constitution does not require that the election districts for the Supreme Court be apportioned

equally by population. Pet. App. 8a-9a. Indeed, the total population deviation among districts is 74.95%. *See* Pet. App. 12a (the Fourth Supreme Court District is 31.62% below the equipopulous district size of 600,843, while the Fifth Supreme Court District is 43.33% above the equipopulous district size).

Although 29 percent of Louisiana's citizens are African American, every supreme court district is majority-white both in total population and in number of registered voters. *See* Pet. App. 10a. No African American person has been elected to the Louisiana Supreme Court in modern times. Only one African American person has served on the Louisiana Supreme Court in this century. He was appointed by the governor to fill a vacancy on the court for a period of 17 days during November of 1979, Pet. App. 35a-36a, and under state law, could not seek election to the seat to which he had been appointed. *See* La. Const. art. V § 22(b).

2. *The Dilution of African American Voting Strength under the Current System of Electing Supreme Court Justices from the First Supreme Court District*

Petitioners are five African American registered voters who live in Orleans Parish and an organization active in voter registration and education. They brought suit on behalf of a class of all African American voters in Orleans Parish raising claims under both section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 and the Fourteenth and Fifteenth Amendments to the Constitution.[2]

The basic theory of petitioners' section 2 claim is that the voting strength of Orleans Parish's African American voters is diluted by their submergence within the majority-white, multimember First Supreme Court District. In proving that claim at trial, petitioners showed the presence of *all* of the relevant circumstances that Congress in amending section 2[3] and this Court in interpreting amended

[2]Only petitioners' section 2 claim is before the Court.

[3]Congress identified seven "[t]ypical factors":

> "1. the extent of any history of official discrimination in the state or political subdivision that touched upon the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the ju:isdiction."

S. REP. NO. 97-417, pp. 28-29 (1982) [hereafter "Senate Report"]. In *Thornburg v. Gingles*, 478 U.S. 30, 43 n. 7 (1986), this Court recognized the "authoritative" nature of the Senate Report.

section 2[4] have treated as probative of a section 2 violation. At this juncture petitioners seek review only of the court of appeals' holding that, as a matter of law, they cannot state

[4]In *Gingles*, this Court identified three critical elements of a section 2 challenge to the use of multimember election districts:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed, . . .--usually to defeat the minority's preferred candidate.

Id. at 50-51.

a claim under section 2.[5] Thus, we summarize the evidence documenting these circumstances only briefly.

This Court has identified racial bloc voting and the degree of minority electoral success as the two "most important Senate Report factors bearing on § 2 challenges to multimember districts," *Thornburg v. Gingles*, 478 U.S. at 48 n. 15. With regard to the first of these central factors, the evidence is undisputed: Voting in judicial elections within the First Supreme Court District is characterized by

[5]After a full trial, the district court ruled against petitioners. Pet. App. 61a-62a. Petitioners appealed that judgment, arguing that the district court had been clearly erroneous with regard to several of its factual findings, and had misapplied the law. After oral argument before the panel, but before a decision was rendered, the Fifth Circuit, sitting *en banc* in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Mattox*, No. 90-813 (Jan. 18, 1991), overruled *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988) (*Chisom I*), which had held section 2 applicable to elections for the Louisiana Supreme Court.

In light of *LULAC v. Clements*, the panel remanded this case to the district court with directions to dismiss petitioners' section 2 claim. *Chisom v. Roemer*, 917 F.2d 187, 188 (5th Cir. 1990) (*Chisom II*). The panel never reached the question whether the district court's findings of fact were clearly erroneous. Nor, despite the fact that all three of the judges on the *Chisom II* panel believed that section 2 does apply to appellate judicial elections, *see LULAC*, 914 F.2d at 635-45 (Higginbotham, J., joined by, among others, King, J.); *id.* at 651-67 (Johnson, J.), did the panel have any opportunity to address petitioners' claims of legal error.

Given the posture of this case, this Court should assume the truth of petitioners' factual allegations. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Accordingly, if this Court reverses the court of appeals, it should remand the case to that court to consider the question whether petitioners have established an actual violation of section 2.

pervasive and severe racial bloc voting.[6] There have been 34 recent judicial elections within the First Supreme Court District in which both African American and white candidates competed.[7] The figures reveal a stark fact: although a majority of African American voters supported the African American candidate in 29 of those elections, white voters *never* cast even a simple plurality of their votes for a *single* African American candidate. They overwhelmingly preferred the white candidate in *every* election.

The difference in support for African American candidates is staggering. Within Orleans Parish, African American support for African American candidates in contested elections since 1978 *averaged* 80 percent. White support for those same candidates averaged only 17 percent.

[6]Senate Report factor 2 and the second and third factors identified in *Gingles*. *See Gingles*, 478 U.S. at 56 (minority political cohesiveness and white bloc voting, taken together, constitute racially polarized voting).

[7]These elections all involved contests for lower courts, such as the Civil District Court, Juvenile Court, and Criminal District Court. No African American has run for the Louisiana Supreme Court since 1972. *See Gingles*, 478 U.S. at 57 n. 25; *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984) ("the lack of black candidates [for a particular position] is a likely result of a racially discriminatory system").

The difference in Jefferson Parish was even greater. There, the average support for the African American candidates among African American voters was 90 percent, while the average support among white voters was only 10 percent. *See* Supp. Pet. App., Table 3.

It is, of course, true that African American candidates *have* won election to both judicial and nonjudicial offices *within* Orleans Parish. *See* Pet. App. 37a-41a. But they have done so *in spite of* overwhelming white support for their opponents; they won only because African American voters outnumber white voters *within Orleans Parish*. *See* Pet. App. 11a. Put simply, analysis of voter behavior in elections involving the four-parish area establishes two things: first, that voting is so racially polarized that no African American candidate can win in an election in which residents of all four parishes vote, and second, that African Americans within Orleans Parish have the potential to elect the candidate of their choice in Orleans Parish-only contests.

This stark racial bloc voting is true for both judicial and nonjudicial races within the four parishes of the First

Supreme Court District. For example, in the 1987 Secretary of State election, which involved ten candidates, African American voters in the four parishes comprising the First Supreme Court District cast a majority of their votes for African American candidate Edwin Lombard, whom the District Court acknowleged to be extremely popular and qualified. Trial Transcript at 120. White voters, however, the majority of their votes for one of the white candidates, and cast only 20 percent of their votes for Lombard. *See* Stipulation 80. Similarly, in the 1988 Democratic presidential primary, the Rev. Jesse L. Jackson received approximately 96.9% of the votes cast by African American voters in the four parishes comprising the First Supreme Court District, but only 3.5% of votes cast by whites. Plaintiffs' Exhibit 1. In short, when African American and white candidates compete for the same office, African American voters within the First Supreme Court District almost always strongly prefer the African American candidate, while white voters invariably and overwhelmingly support the white candidate.

Second, there is a total lack of African American electoral success in elections involving the entire First Supreme Court District.[8] No African American has won election to *any* parish-wide office in St. Bernard, Plaquemines, or Jefferson Parishes in recent times. Pet. App. 42a. Because the electorate of the First Supreme Court District is majority white, the severe degree of racial bloc voting that prevails makes it impossible for the African American community to elect an African American to the Louisiana Supreme Court.[9]

With regard to the Senate Report factors that this Court has identified as "supportive of, but *not essential* to, a

[8]Senate Report factor 7.

[9]There are 492,691 registered voters in the First Supreme Court District, 156,714 of whom (31.8%) of whom are African American and 335,977 (68.2%) of whom are white. For the African American candidate to win, he or she would have to attract roughly 28 percent of the white vote (even using the unrealistic assumptions that African American voters participate in judicial elections at as high a rate as white voters, *see* Pet. App. 51a, and that *every* African American voter votes for the African American candidate, *see id.*). In only three of 32 parishwide races *within* Orleans Parish did an African American candidate receive more than a quarter of the white vote. *See* Supp. Pet. App. Table 3. In *no* election in the three suburban parishes did an African American fare that well. *Id.*; *see also Major v. Treen*, 574 F. Supp. 325, 339 (E.D. La. 1983) (three-judge court) (white voters in the suburban parishes, who moved out of Orleans Parish largely to escape school desegregation decrees, are less likely than white voters within Orleans Parish to support African American candidates); U.S. Exhibit 49 at 12 (same).

minority voter's claim," *Gingles*, 478 U.S. at 48 n. 15, the evidence is equally compelling. First, elections for Supreme Court Justice from the First Supreme Court District are characterized by *all three* of the structural practices Congress identified as likely to "enhance the opportunity for discrimination" against minority voters: unusually large election districts, majority vote requirements, and anti-single shot provisions. Senate Report at 29.[10] The First Supreme Court District has twice the population of any congressional district in Louisiana and, in terms of population, is the largest of *any* of the state's election districts. Stipulation 82. African American candidates are particularly handicapped by the large number of voters who must be reached and persuaded. *See* Pet. App. 32a. In addition, a majority vote requirement applies to elections for the Supreme Court. Pet. App. 7a. Finally, elections for the two Supreme Court positions from the First Supreme Court District are not conducted in the same year. Because the terms are staggered, voters are prevented from single-shot voting. Pet.

[10]Senate Report factor 3.

App. 8a; Stipulation 22.[11]

Second, race plays a significant role in the electoral process.[12] While there is no formal slating process for judicial candidates within the First Supreme Court District,[13] bar association endorsements provide a critical form of candidate support akin to slating in traditional legislative contests. "All of the current officers of the Louisiana Bar Association are white, and no black judge has ever served as one of the officers of the Louisiana District Judges Association." Pet. App. 31a. Moreover, the New Orleans

[11]Single shot voting occurs when a voter (or group of voters) casts votes for fewer than all the seats for which he or she is entitled to vote. For example, in an election in which voters are entitled to vote for two judicial candidates to fill two seats on the bench, a voter who single-shot votes would cast a vote for only his or her first-choice candidate. By denying other candidates any electoral support, the single-shot voter will increase the share of the total vote cast received by his or her first choice. A cohesive racial minority may have the potential, under certain circumstances (such as a very fragmented white electorate), to use this strategy to elect its preferred candidate. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 184 n. 19 (1980) (explaining the mechanics of single-shot voting). If each seat in a multimember district is elected separately, however, single-shot voting becomes impossible. *Id.*

[12]In 1960 Louisiana enacted a statute, struck down by this Court in *Anderson v. Martin*, 375 U.S. 399 (1964), that put on the ballot the race of each candidate "for any elective office in this state," *id.* at 400 n. 1 (quoting LA. REV. STAT. § 18:1174.1), treating judicial positions identically with all other offices. This Court found that the statute represented an attempt by the state to "require or encourage its voters to discriminate upon the grounds of race." *Id.* at 402.

[13]Senate Report factor 4.

Bar Association has never endorsed an African American candidate for judicial office. Pet. App. 32a. Although the district court found no overt racial appeals in judicial elections, *see* Pet. App. 42a, race continues to play a prominent role in political campaigns in the First District, particularly in Jefferson, Plaquemines and St. Bernard parishes.[14] For example, African American candidates for positions on lower courts within the First Supreme Court District have been advised by white consultants not to use their pictures on campaign literature or make personal appearances in Jefferson Parish, since such behavior would highlight their race and cause white voter backlash. *See* Trial Transcript at 64-66, 69-70, 74, 87-88. Moreover, African American candidates are often reluctant to travel into some areas of the First Supreme Court District because of fears for their physical safety. A sitting African American lower court judge testified that he would feel "intimidated" campaigning in either Plaquemines or St. Bernard parishes, *see* Trial Transcript at 25, and that, on a

[14]Senate Report factor 6.

recent trip to hold a judicial session in Plaquemines, he had had the Sheriff of Orleans Parish contact the Sheriff of Plaquemines, in order to ensure his safety while travelling in Plaquemines. *Id.*[15]

Third, Louisiana's long history of discrimination[16] in the area of voting rights is undisputed. Pet. App. 22a-23a; *see also Louisiana v. United States*, 380 U.S. 145, 148-50 (1965) (describing Louisiana's racially discriminatory use of "grandfather clauses," "interpretation" tests, white primaries, and wholesale purging and challenging of black voters); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court) (describing Louisiana's history of racial discrimination in voting). Nor is that discrimination simply ancient history. It continues to deny, dilute and abridge the

[15]For a general history of discriminatory administration of justice within Plaquemines Parish, see, e.g., *Sobol v. Perez*, 289 F. Supp. 392, 401-02 (E.D. La. 1968) (three-judge court) (per curiam) (detailing, *inter alia*, how the parish's elected state court district judge and other authorities had harrassed the civil rights lawyer representing the defendant in *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

[16]Senate Report factor 1.

voting rights of Louisiana's African American citizens.[17]

Fourth, the lingering effects of Louisiana's long, undisputed history of discrimination in such areas as education and employment have left Orleans Parish's African American citizens less able than white citizens to participate effectively in the political process.[18] Pet. App. 30a-32a. Census figures showed vast disparities in socioeconomic indicators between African Americans and whites within the First Supreme Court District. Pet. App. 30a; Stipulations

[17]Since 1965, Louisiana has been subject to the special preclearance provisions of the Voting Rights Act of 1965. 30 Fed. Reg. 9897 (1965). Pursuant to those provisions, twelve parishes, including one within the First Supreme Court District, have been designated for the appointment of federal examiners. Stipulation 45. Moreover, between 1965 and 1981, the Department of Justice objected to over one hundred proposed changes of Louisiana's electoral laws (including several applicable only to Orleans Parish) because it was unable to conclude that the changes had neither a discriminatory purpose nor a discriminatory effect. *See Voting Rights Act: Hearings on S. 53, S. 1761, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 97th Cong., 2d Sess. 1783 (1982) [hereafter *"1982 Senate Hearings"*]. Finally, the state and localities within the First Supreme Court District have continued to use districting schemes that diluted African American voting strength. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 488 U.S. 1002 (1989) (invalidating use of at-large elections for city council of Jefferson Parish municipality); *Major v. Treen*, 574 F. Supp. 345 (E.D. La. 1983) (three-judge court) (striking down the state's 1980 congressional apportionment in the Orleans Parish area on section 2 grounds); *Beer v. United States*, 425 U.S. 130, 135 (1976) (describing how the scheme for electing the New Orleans City Council initially adopted following the 1970 census improperly diluted black voting strength).

[18]Senate Report factor 5.

36-45 and 93-99. For example, the median family income for white families was twice the median income for African American families in Orleans Parish. Stipulations 106 and 107. The upshot of this is that "[t]he relatively lower economic status of local black residents further affects . . . such practicalities as campaign funding. In this regard, both Judge [Revius] Ortique and Judge Bernadette Johnson testified that black [judicial] candidates have considerable difficulty raising campaign funds and that generally, the better funded candidates win." Pet. App. 32a.

In addition to the Senate Report factors, this Court has identified an additional circumstance relevant to section 2 claims of dilution through submergence: is the minority group "sufficiently large and geographically compact to constitute a majority in a single-member district"?[19] In this case, it is eminently possible to create a majority-African American Supreme Court District. Orleans Parish, which contains more than half of the current First Supreme Court District's total population, is majority African American in

[19]*Gingles* factor 1.

both total population and registered voters. *See* Pet. App. 10a & 11a. It would be possible to divide the current district into an Orleans Parish-only district and a suburban district containing Jefferson, St. Bernard, and Plaquemines Parishes. The Orleans Parish district would be majority African American, while the suburban district would be overwhelmingly white. Each of these districts would have a population roughly the size of the current Sixth Supreme Court District. *See* Pet. App. at 10a. They would thus fit comfortably within the population deviations currently countenanced by Louisiana's practice. Moreover, both districts would adhere to the State's practice of not dividing parishes between or among Supreme Court Districts.[20]

[20]The United States, petitioner in No. 90-1032, *United States v. Roemer*, appeared as a plaintiff-intervenor at trial. It presented evidence showing that a smaller population deviation could be obtained while still creating a majority-African American single-member district by adding contiguous, predominantly African American areas of Jefferson Parish to Orleans Parish. *See* United States' Exhibit 14. According to the 1980 Census, this district would have a population deviation from the ideal district of -4.4%.

3. *The Course of the Proceedings Below*

Petitioners filed their complaint in 1986. Originally, the district court dismissed their complaint holding, among other things, that section 2 did not apply to the election of judges. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987). A panel of the Fifth Circuit unanimously reversed, holding that the plain language, the legislative history of the original Voting Rights Act and of the 1982 amendments, the complementary operation of section 2 and section 5 (which this Court has consistently held applicable to judicial elections, *see Georgia State Board of Elections v. Brooks*, 111 S. Ct. 288 (1990) (No. 90-332); *Martin v. Haith*, 477 U.S. 901 (1986), *summarily aff'g*, 618 F. Supp 410 (E.D.N.C. 1985)), and the longstanding interpretation of the Act by the Attorney General compelled the conclusion that section 2 covers judicial elections. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom I*). The defendants' requests for rehearing and rehearing *en banc* were denied without dissent, and this Court denied certiorari. *Roemer v.*

Chisom, 488 U.S. 955 (1988).

Petitioners then sought an injunction enjoining the state from going forward with an election under the challenged system. The district court granted petitioners' request, *Chisom v. Roemer*, 690 F. Supp. 1524 (E.D. La. 1988), but a divided panel of the court of appeals reversed, *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988).

The case then proceeded to trial.[21] After trial, the district court concluded that petitioners had not established a violation of section 2. Pet. App. 52a-61a. Petitioners appealed, contending that the district court both made clearly erroneous findings of fact and misapplied the relevant law. After briefing and oral argument occurred, the Fifth Circuit, sitting *en banc* in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Mattox*, No. 90-813 (Jan. 18, 1991), overruled *Chisom I*. In light of *LULAC*, the panel

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[21]The United States, which had previously participated in the court of appeals as *amicus curiae*, intervened as a party plaintiff upon the Attorney General's certification that this was a case of exceptional public importance.

remanded this case to the district court with directions to dismiss petitioners' section 2 claim. *Chisom v. Roemer*, 917 F.2d 187, 188 (5th Cir. 1990) (*Chisom II*).

SUMMARY OF THE ARGUMENT

The plain language and structure of the Voting Rights Act of 1965 show that section 2 covers judicial elections. The Act's definitional provision covers voting for every "public office" without exception, and section 2 itself provides that "no voting procedure" may be used that results in racial vote dilution. Moreover, this Court has unanimously held that section 5 of the Voting Rights Act, which Congress expressly directed be interpreted in tandem with section 2, covers judicial elections. If section 5 reaches judicial elections, then section 2 must as well.

The legislative history of the Act, from its original passage in 1965 through its extensions and amendments in 1970, 1975, and 1982, buttresses the conclusion that section 2 covers judicial elections. The drafters of original section 2 intended it to cover every election, and the Congresses

that extended and amended the Act were aware of its salutary impact in integrating state court benches. The 1982 amendments of section 2 were intended to expand section 2's scope further, and Congress' use of the word "representatives" in a single statutory clause cannot be read as an attempt to carve out an exemption from the Act for judicial elections.

The fact that the one-person, one-vote requirement does not apply to judicial elections is irrelevant to the scope of section 2. The quantitative theory of vote dilution that underlies one-person, one-vote is entirely distinct from the qualitative theory of vote dilution that provides the basis for section 2. Indeed, one-person, one-vote is intended to protect the voting rights of the majority while section 2 is intended to protect the voting rights of minorities.

Nor do ostensibly unique aspects of the judicial office justify creating an exception to section 2's broad coverage. The fact that judges need not be elected has no bearing on whether, having decided nonetheless to elect its judiciary, a state must ensure that its election system is fair to African

American voters. In addition, although they do not respond directly to constituent sentiment, elected judges are "representatives" in several significant respects. Furthermore, it is critical to the administration of justice that no identifiable racial group be excluded from participating equally in the adjudicative process.

Lastly, manageable standards exist for assessing section 2 claims involving judicial elections. Congress has set out a flexible, totality-of-the-circumstances test that is entirely appropriate for evaluating allegations of racial vote dilution in the election of judges. And the inapplicability of the one-person, one-vote requirement poses no serious obstacle to determining whether non-dilutive alternatives to the present system exist.

ARGUMENT

I.
THE PLAIN LANGUAGE AND STRUCTURE OF THE VOTING RIGHTS ACT COMPELS THE CONCLUSION THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS

This Court has long recognized Congress' "intention to give the [Voting Rights] Act the broadest possible scope," *Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969). The plain language Congress chose to describe the Act's coverage and the Act's overall structure convincingly show that judicial elections are covered by section 2.

A. *The Plain Language of the Act*

Section 2 announces an absolute prohibition on racial discrimination in voting:

> *No* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in the denial or abridgement of the right of any citizen of the United States to vote on account of color . . . .

42 U.S.C. § 1973(a) (emphasis added). Section 2 contains neither an express nor an implicit exemption for *any*

category of elections. *See also South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1965) (section 2 "broadly prohibits" voting discrimination). Had Congress intended to permit states to conduct their judicial elections in a fashion that results in denying or abridging the voting rights of African Americans, it surely would have said so directly.

Moreover, the definitional provision of the Act, section 14(c)(1), confirms the conclusion that section 2 reaches judicial officers, for it states, in pertinent part, that

> [t]he terms "vote" or "voting" shall include all action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly *with respect to candidates for public* or party *office* and propositions for which votes are received in an election.

42 U.S.C. § 1973*l*(c)(1) (emphasis added). Aspirants for elective judicial positions, such as Justice of the Louisiana Supreme Court, are clearly "candidates for public . . . office," and the means by which they attain those offices are equally clearly "elections." *See also Dougherty County Board of Education v. White*, 439 U.S. 32, 37 (1978)

(section 14(c)(1) "expansively defines the term 'voting'"). The plain language of the Voting Rights Act thus shows Congress' consistent intention to reach *all* forms of electoral discrimination and to ensure that African Americans have an equal opportunity to elect state-court judges as well as other elected officials.

B. *The Relationship Between Section 2 and Section 5*

This Court has squarely held that section 5 of the Voting Rights Act, 42 U.S.C. § 1973c--which requires certain jurisdictions (including Louisiana) with a history of racial discrimination to seek the prior approval ("preclearance") of either the Attorney General or the United States District Court for the District of Columbia before making any change in their election practices--applies to judicial elections. *See State Board of Elections v. Brooks*, 111 S.Ct. 288 (1990); *Martin v. Haith*, 477 U.S. 901 (1986). The Attorney General, the official responsible for interpreting and administering section 5, has consistently applied section 5 to judicial elections, and he informed

Congress of this practice prior to the 1982 extension of section 5. *See, e.g., Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3948 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 2246 (1981) ["*1982 House Hearings*"] (noting Attorney General's letter of Dec. 26, 1972, to the State of Alabama, interposing an objection to a change from "elective to appointive judges"); *id.* at 2247 (noting Attorney General's letter of Dec. 20, 1976, to the State of Alabama, objecting to "Act No. 1205 [which] combines counties for [a] judicial district); *id.* at 2260 (noting Attorney General's letters of Feb. 7, 1980, and Oct. 10, 1980, to the City of Baton Rouge and the State of Louisiana, regarding the use of majority-vote requirements for elected judges).

Given this Court's repeated, unanimous conclusion that section 5 covers judicial elections, the relationship between that provision and section 2 compels the conclusion that section 2 applies to judicial elections as well. Congress

explicitly intended the two provisions to work in tandem. *See* Senate Report at 5-6. It explained:

> Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under section 2] or preclearance [under section 5]. The lawfulness of such a practice should not vary depending on when it was adopted, i.e., whether it is a change.

H.R. REP. No. 97-227, p. 28 (1982) ["House Report"]; *see also 1982 Senate Hearings* at 85 (testimony of Attorney General William French Smith) (the 1982 amendments to section 2 "exten[d] nationwide" the effects test of section 5 and apply that test not only to proposed changes but also "to existing situations"). To adopt the position that only section 5 applies to judicial elections would ignore Congress' position that "[s]ection 2 remains *the major* statutory prohibition of *all* voting rights discrimination," Senate Report at 30 (emphasis added), and would "lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if a state sought to introduce that very procedure as a change from existing procedures, it

would be subject to Section 5 preclearance and could not be implemented." *LULAC v. Clements*, 914 F.2d at 645 (Higginbotham, J., concurring in the judgment). Congress did not enact a Voting Rights Act "grandfather clause" that lets Louisiana continue to elect its Supreme Court under a regime that the Voting Rights Act would not permit it to adopt today.

II.
THE LEGISLATIVE HISTORY OF THE 1965 ACT AND THE 1982 AMENDMENTS CONFIRMS THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS

Since its enactment in 1965, the Voting Rights Act has been extended thrice (in 1970, 1975, and 1982) and substantially amended. At each juncture, Congress has made clear its commitment "to counter the perpetuation of 95 years of pervasive voting discrimination," *City of Rome v. United States*, 446 U.S. 156, 182 (1980), and to "create a set of mechanisms for dealing with continued voting discrimination . . . comprehensively and finally." Senate Report at 5.

A. *Congress' Intention in 1965*

The Voting Rights Act originated as H.R. 6400, a bill drafted by the Johnson Administration and introduced by Rep. Emanuel Celler, the Chairman of the House Judiciary Committee. That Committee conducted lengthy hearings on the bill. *See Voting Rights: Hearings Before Subcomm. No. 5 of the House Judiciary Comm. on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitutional of the United States*, 89th Cong., 1st Sess. (1965) ["*1965 House Hearings*"]. At those hearings, Attorney General Nicholas D. Katzenbach testified in detail as to the bill's scope. This Court has held that, "in light of the extensive role [he] played in drafting the statute and explaining its operation to Congress," Attorney General Katzenbach's construction of the Act is entitled to great weight. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 & n. 20 (1978); *see also Dougherty County Board of Education v. White*, 439 U.S. at 37 n. 5; *Allen v. State Board of Elections*, 393 U.S. at 566-59;

Senate Report at 17 & n. 51.

Attorney General Katzenbach's statement to the Committee was explicit: "*Every election in which registered electors are permitted to vote* would be covered" by the new Act. *1965 House Hearings* at 21 (emphasis added). He reiterated this intention in a number of additional colloquies. *See, e.g., id.* at 50 (responding to Rep. Byron Rogers); *id.* at 67 (responding to Rep. Robert Kastenmeier); *id.* at 121 (responding to Rep. Jacob Gilbert). The Attorney General made clear that there was *no* categorical exception to the Act's scope.

Moreover, the Attorney General's statement to the Committee reflected the Administration's awareness of and concern about the relationship between the elected southern judiciary and the denial and abridgment of African American voting rights. One of the central props buttressing the "establish[ment of] white supremacy in a completely segregated society," *United States v. Mississippi*, 380 U.S.

128, 144 (1965),[22] was the maintenance of "[a]n electoral system to preserve the white control on executive *and judicial offices*," *United States v. Mississippi*, 229 F. Supp. 925, 985 n. 35 (S.D. Miss. 1964) (three-judge court) (Circuit Judge John R. Brown, dissenting) (emphasis added), *rev'd*, 380 U.S. 128 (1965).[23] Attorney General Katzenbach opened his testimony explaining the need for the Voting Rights Act with an account of how efforts to register African American voters in Selma, Alabama, had been obstructed by local officials. He explicitly identified the role of *elected state-court judges*, who had "*convicted*, and *punished* Negroes discriminatorily, and had *issued* and enforced *injunctions* preventing Negroes from organizing and discussing their grievances." *1965 Hearings* at 8

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[22]The opinion in *United States v. Mississippi* was discussed by Assistant Attorney General Marshall in his testimony before the Committee, *see 1965 House Hearings* at 306, and was introduced into the hearings record, *id.* at 484.

[23]This history is set out in a number of sources. *See generally, e.g.*, SOUTHERN JUSTICE (L. Friedman ed. 1963). *See also, e.g., Hamilton v. Alabama*, 376 U.S. 650 (1964) (reversing contempt citation issued by elected state trial judge and upheld by elected state supreme court because an African American litigant refused to be addressed by her first name when white witnesses were given courtesy titles); *Johnson v. Virginia*, 363 U.S. 61 (1963) (reversing conviction of African American spectator who refused to sit in segregated area of a courtroom).

(emphasis added).[24]

Against this backdrop of pervasive African American disenfranchisement and defiance of federal constitutional law by an elected state judiciary, Congress sought to empower African American citizens comprehensively by guaranteeing their full participation in every aspect of the electoral process. Thus, as the Fifth Circuit recognized, section 2, as originally enacted, clearly covered judicial elections. *LULAC v. Clements*, 914 F.2d at 625.[25]

B. *Congress' Understanding During the 1970 and 1975 Extensions*

In both 1970 and 1975, Congress extended the preclearance provisions of section 5 of the Voting Rights

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[24]The Department of Justice was at the time of the 1965 hearings involved in a lawsuit against, among others, Alabama state court Judge James Hare, who had been issuing what a federal court found to be "unwarranted and illegal injunctions" against demonstrators seeking the right to vote in Selma. *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (three-judge court); *see also* D. GARROW, PROTEST AT SELMA 33-34, 39-40 & 282 n. 55 (1978) (describing Hare's use of his judicial power to quash African American attempts to register).

[25]The slender reed upon which the Fifth Circuit ultimately relies in claiming a congressional intention to exempt judicial elections from section 2--the presence in the 1982 amendments of the word "representatives," *see LULAC v. Clements*, 914 F.2d at 624-30--is completely irrelevant to Congress' original intent, since the word appears nowhere in the statute.

Act. *See* Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975). On both occasions, Congress identified the increasing presence of elected minority jurists on state court benches as a sign of progress under the Act. *See, e.g.*, S. REP. No. 94-295, p. 14 (1975) (relying on figures from the U.S. Commission on Civil Rights that showed the number of African American "judges" and "justices of the peace" elected in counties with populations that were more than 25% African American); H.R. REP. No. 94-196, p. 7 (1975) (referring to documents describing the number of African American "Judges, Justices [and] Magistrates" elected in various jurisdictions); 115 Cong. Rec. 38,493 (Dec. 11, 1969) (comments of Rep. Ryan) (inclusion of table showing number of African American elected "Judges, District Court, . . . Magistrates, [and] Justices of the peace"). Thus, Congress clearly ackowledged again that one of the intended consequences of the Voting Rights Act was to enable minority citizens to participate equally in judicial elections and to elect minority judges to state courts.

C. *The 1982 Extension and Amendment of the Voting Rights Act*

In 1982, Congress revised the Voting Rights Act in several significant respects. First, it amended section 2 to "dispositively rejec[t] the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980)," requiring plaintiffs in a vote-dilution lawsuit to prove that the challenged practice was adopted or maintained for a discriminatory purpose. *Thornburg v. Gingles*, 478 U.S. at 43. Second, it extended the special preclearance requirement of section 5.

Significant attention was devoted to the progress minority voters had made in electing the candidates of their choice to a wide variety of public offices. And elected state-court judges were again explicitly included within the data relied on by Congress. *See, e.g.* H. REP. NO. 97-227, p. 7-9 (1982) (relying on a report by the Joint Center for Political Studies, Black Elected Officials: A National Roster, 1980, at 4-5, 14-15, which specifically identified judges); *1982 House Hearings* at 38, 193, 239, 280, 503,

574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (referring to elected state-court judges); *1982 Senate Hearings* at 208-09, 669, 748, 788, 789 (1982) (same). Not once did a single witness suggest that the election of judges should be treated any differently than the election of any other official. Not once did a single witness or Member of Congress suggest that judicial elections should be exempted from the Act generally, or from section 2 specifically.[26]

It was against this background of clear awareness of the Voting Rights Act's role in integrating the elected state judiciary and disapproval of the approach taken by this Court in *Bolden* that Congress amended section 2 of the Voting Rights Act. The most elementary consideration of Congress' purpose in amending section 2 utterly forecloses the argument that, despite the presence of explicit congressional intent in 1982 to broaden the scope of the Voting Rights Act, Congress implicitly exempted judicial

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[26]Indeed, the one explicit statement regarding the coverage of judicial elections under section 2 expressly stated that the amended section *would* "encompas[s] all governmental units, including . . . judicial districts . . . ." Senate Report at 151 (separate comments of Sen. Orrin Hatch).

elections from the scope of section 2.

First, section 2 was amended to eliminate any requirement that a plaintiff claiming racial vote dilution prove the dilutive *purpose* as well as the dilutive *result* of the challenged practice. Thus, section 2 of the Voting Rights Act provides *broader* protection than either section 1 of the Fourteenth Amendment or section 1 of the Fifteenth Amendment, because they each require proving purpose as well as result. Senate Report at 15, 39-40. The Fifteenth Amendment, of course, clearly prohibits states from electing their judges under a system that purposefully dilutes African American voting strength. *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980). The *only* difference between the Fifteenth Amendment and amended section 2 is the presence of a purpose requirement. *See* Senate Report at 36-37 (whether or not a discriminatory purpose is shown is irrelevant to finding liability under section 2). Therefore, section 2 must prohibit states from electing their judges under a system that results in the dilution of black voting strength, whatever the purpose of

the system. Had Congress intended to create an exemption to the results test for judicial elections, it would have done so expressly.

Second, the inclusion of the word "representatives" in the delineation of the results test of amended section 2 provides absolutely no warrant for inferring an exemption of judicial elections from section 2's scope. That language was added to "embod[y] the test laid down by the Supreme Court in *White* [*v. Regester*, 403 U.S. 182 (1971)]," for determining when the use of multimember election districts dilutes minority voting strength. Senate Report at 27. It was not added to limit the preexisting scope of section 2, which undeniably covered judicial elections prior to 1982.[27] Moreover, in discussing the *White* results test, Congress used the word "representative" interchangeably with such words as "candidate" or "elected official." *See, e.g.*, Senate

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[27]The Fifth Circuit relied reflexively on language in the opinions of various district courts that had held that one-person, one-vote does not apply to judicial offices because judges are not "representatives" to lend color to its contention that Congress chose the word "representatives" precisely to exclude judges from the scope of section 2. *See LULAC*, 914 F.2d at 626 n. 9 (citing cases). Notably, not a single reference to any of the cases mentioned by the *LULAC* court appears anywhere in the legislative history of the 1982 amendments.

Report at 16, 28, 29, 30, 31, and 67; House Report at 4, 18. Thus, Congress never evinced any intention to give "representative" the exceptionally restrictive meaning advanced by the court of appeals in *LULAC*. To inject such an exemption into section 2 would violate the elementary canon of statutory construction that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) (internal quotation marks omitted). The plain, obvious, and rational meaning of section 14(c)(1) has always been that *all* elections, including judicial elections, are covered by *all* of the Act's substantive commands.[28] And the plain, obvious, and rational meaning of the 1982 amendment of section 2 was simply to eliminate the purpose requirement announced in *Mobile v. Bolden* and to continue the coverage of elected state court judges that

[28]Nothing in the 1982 amendments altered section 14(c)(1), which defines the term "voting" for purposes of section 2 and section 5.

had existed since 1965.

III.
THE INAPPLICABILITY OF THE ONE-PERSON, ONE-VOTE REQUIREMENT OF THE EQUAL PROTECTION CLAUSE TO JUDICIAL ELECTIONS IS IRRELEVANT TO THE SCOPE OF SECTION 2

In *Wells v. Edwards*, 409 U.S. 1095 (1973), this Court summarily affirmed the holding of a district court that the requirement of one-person, one-vote does not govern elections to the Louisiana Supreme Court. 347 F. Supp. 453 (M.D. La. 1972) (three-judge court). The court of appeals seized on this holding to conclude that the statutory prohibition on racial vote dilution contained in section 2 should not apply to judicial elections either. *LULAC*, 914 F.2d at 626-28. That conclusion is simply wrong. First, this Court's resolution of *Wells* does not exempt judicial elections from constitutional and statutory scrutiny altogether. Second, the requirement of equipopulous districting and the purposes it serves are entirely distinct from the prohibition on racial vote dilution and its central objective.

A. *The Equal Protection Clause Does Govern Judicial Elections*

The equal protection clause of the Fourteenth Amendment is broader than the judicially created requirement of one-person, one-vote. Thus, even though one-person, one-vote does not govern judicial elections, the equal protection clause itself *does* apply to judicial elections. *See Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 730 (1973) (even though the appellants who challenged a scheme for electing members of a limited authority "derive no benefit from the *Reynolds* and *Kramer* lines of cases, they are, of course, entitled to have their equal protection claims assessed"). Thus, for example, it would undeniably violate the equal protection clause for Louisiana to allow only voters born in odd-numbered years to vote in elections to pick the Supreme Court. It would also violate the equal protection clause, as well as the Fifteenth Amendment, for Louisiana to deliberately establish or maintain a judicial election system

that makes it impossible for African American voters to cast effective ballots. If, for example, a Louisiana statute expressly provided that ballots would be identified according to the race of the persons who had cast them, and that a ballot cast by an African American voter would be counted as one-half of a vote for the candidate named, that, too, would violate the equal protection clause, despite the fact that one-person, one-vote does not apply to judicial elections.

Thus, the constitutional protection of the efficacy and weight of African American ballots in judicial elections clearly extends beyond the protection afforded by the requirement of equipopulous districting. And since Congress has the power under the enforcement clauses of the Fourteenth and Fifteenth Amendments to ban practices with discriminatory effects, as well as practices with discriminatory purposes, its use of that power in enacting the Voting Rights Act reaches even practices that would pass muster under the one-person, one-vote cases.

B. *The Theory of Vote Dilution Underlying One-Person, One-Vote Is Entirely Distinct from the Theory of Racial Vote Dilution Embodied in Section 2*

Reynolds v. Sims, 376 U.S. 533 (1964), struck down the apportionment scheme for the Alabama legislature because population disparities among the districts diluted the voting strength of voters living in the more heavily populated districts. But "population differences are not the only way in which a facially neutral districting plan might unconstitutionally undervalue the votes of some and overvalue the votes of others." Senate Report at 20. Even when one person's vote, in the abstract, is worth as much as any other person's, racial polarization and the submergence of a discrete and insular group of African Americans in a majority-white electoral jurisdiction may effectively deny the members of that group any opportunity to elect the candidates they prefer. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *Burns v. Richardson*, 384 U.S.

73, 88-89 (1966).

Indeed, *White v. Regester*, and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), the two cases on which Congress relied in delineating the results test of amended section 2, Senate Report at 28 n. 113, *both* rest on precisely that distinction. In *White*, this Court reversed the district court's determination that the apportionment of the Texas House of Representatives violated one-person, one-vote, but sustained a finding that the use of multimember districts impermissibly diluted African American and Hispanic voting strength. *Compare* 412 U.S. at 761-64 (rejecting plaintiffs' one-person, one-vote claims) *with id.* at 765-70 (finding impermissible racial vote dilution). Even more pointedly, in *Zimmer* a one-person, one-vote challenge was not even theoretically available. East Carroll Parish selected its police jury through at-large elections, which as a matter of definition comply with one-person, one-vote: there can be no population deviation among districts when there are no

districts. *Zimmer*, 485 F.2d at 1301. The fact that plaintiffs could advance a claim of racial vote dilution despite the exemption of at-large elections from attack on one-person, one-vote grounds totally undercuts the assumption on which the *LULAC* analysis rests: that the inapplicability of one-person, one-vote to judicial elections necessarily shields them from scrutiny under section 2.

Another way of understanding this distinction is to realize that *Reynolds v. Sims* and its progeny protect an interest that is entirely distinct from the interest protected by the constitutional and statutory prohibitions on racial vote dilution. The standard required by *Reynolds* attempts to protect *majority* voting rights. Equipopulous districting combats the "frustration of the majority will" that results from malapportionment, 377 U.S. at 576, and prevents "a minority strangle hold on the State Legislature," *id.* at 570.[29]

[29]This Court's central concern with protecting the majority's voice in the legislative process explains why, in *Reynolds* and its companion cases, the Court so heavily emphasized the fact that the existing apportionment schemes allowed a numerical minority of the population to elect a majority of the states' legislators. *See, e.g., Reynolds*, 377 U.S. at 569; *WMCA v. Lomenzo*, 377 U.S. 633, 647 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 665-66 (1964); *Davis v. Mann*, 377 U.S. 678, 688-89 (1964); *Roman v. Sincock*, 377 U.S. 695, 705 (1964); *Lucas v. Colorado General assembly*, 377 U.S. 713, 725 (1964).

But the value underlying the prohibition on racial vote dilution is the protection of *minority* voters' participation. *See Gingles*, 478 U.S. at 49 and 50-51 (setting out the test for claims of racial vote dilution under section 2 with reference to "minority" voters' opportunities to participate); Senate Report at 28-29 (repeatedly using the word "minority" in describing the factors relevant to assessing a section 2 violation). And section 2 protects the voting rights of African Americans even when they "constitut[e] a distinct population and registered-voter minority in each challenged district." *Gingles*. 478 U.S. at 38.

The difference between the underpinnings of one-person, one-vote and section 2's ban on racially dilutive voting schemes totally undermines the court of appeals' reliance on the summary affirmance in *Wells*. Put simply, the inapplicability of constitutional requirements of equipopulous districting to judicial elections casts no light whatsoever on the scope of section 2.

IV.
THE POST-ELECTION DUTIES OF JUDGES DO NOT JUSTIFY CREATING AN EXCEPTION TO SECTION 2'S COVERAGE OF JUDICIAL ELECTIONS

The analytic heart of the court of appeals' opinion in *LULAC* is a normative vision of "the judge's office" as the "precise antithesis" of a "representative one." 914 F.2d at 628. Thus, the court below concluded, section 2 does not apply to judicial elections for "the cardinal reason that judges need not be elected at all." *Id.* at 622.

A fair reading of the majority's opinion will discern in it a deep uneasiness with the idea of an elected judiciary. But whether judges should or shouldn't be elected is quite simply beside the point. Louisiana *has* decided to elect its Supreme Court. The only question properly before this Court is whether a state that elects its judges can use an election system that denies African American voters the ability to participate fully in the selection process. As we explain below, the court of appeals' approach is trebly flawed. First, the court of appeals erred in holding that the

fact that the constitution does not require that states elect their judges relieves states of the obligation to use racially fair election systems. Second, the court of appeals improperly substituted its judgment regarding the proper level of popular control for the State of Louisiana's judgment. Third, the court of appeals ignored a clear, longstanding concern with ensuring representativeness within the state adjudicatory process.

A. *That Judges Need Not Be Elected At All Is Irrelevant to Whether Section 2 Covers Judicial Elections*

It is, of course, true that states have substantial latitude in deciding how to select their judiciary.[30] But if a State *does* choose to select its judges through popular elections, it must comply with section 2.

The fact that judges need not be elected in the first place is irrelevant to section 2's coverage. States are not

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[30]A decision by a state, such as Louisiana that is covered by section 5 of the Voting Rights Act to *change* from an elected to an appointive judiciary would require preclearance. *See Brooks*, 111 S.Ct. 288; *Haith*, 477 U.S. 901; *cf. Allen*, 393 U.S. 301 (change from elected to appointed superintendent of schools in certain Mississippi counties required preclearance).

required to hold elections to fill positions on local boards of education either, because such boards are of a "nonlegislative character." *Sailors v. Board of Education of Kent County*, 387 U.S. 105, 108, 111 (1967). But when local school boards *are* filled by election, section 2 clearly applies. *See, e.g., United States v. Dallas County Commission (and Dallas County Board of Education)*, 850 F.2d 1430 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989); *League of United Latin American Citizens v. Midland Independent School District*, 829 F.2d 546 (5th Cir. 1987); *Buckanaga v. Sisseton Independent School District No. 545*, 804 F.2d 469 (8th Cir. 1986); *Brown v. Board of School Commissioners*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983). *Cf. Allen v. State Board of Elections (Bunton v. Patterson)*, 393 U.S. 544 (1969) (section 5 covers change from elected to appointed school superintendent).

It is the fact of election, then, rather than the function performed by an elected official after his or her selection, that triggers section 2. Section 2 is intended to protect

minority *voters'* ability to participate in the election process, including their right to cast effective ballots. Nothing in section 2 limits its scope only to offices that must constitutionally be filled by election.

B. *Elected Judges Are In Fact "Representatives"*

The court of appeals asserted that because judges have no "constituents" and do not speak on behalf of "segments" of the community, they are not "representatives," and may therefore be elected in ways that deny to African Americans the ability whites enjoy to determine *which* persons should speak for the whole community. *LULAC*, 914 F.2d at 628.

In fact, judges *do* represent the community in that they "speak and act for [it] by delegated authority," RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1634 (2d ed. 1987) (defining "represent"). In a democracy, all power ultimately flows from popular consent. When a state's constitution or statutes gives judges the right to exercise adjudicative authority, judges are ultimately "representatives" of the people. The *way* in which judges

"represent" the community may differ significantly from the way in which legislators "represent" it, because judges are not expected to base their determinations on the voters' views about proper outcomes. But they are "representatives" nonetheless. They "represent" (in the sense of "reflecting") the choice of the voters as to who should exercise, on behalf of the community as a whole and using his or her independent judgment, adjudicative power.

Implicit in the court of appeals' analysis is the belief that judges should not be elected at all, because election inevitably compromises judicial independence from popular passions and sentiments. It would hardly be surprising if federal judges were to prefer an appointed judiciary, enjoying life tenure, to an elected judiciary, dependent for its continuation in office on popular approval. But the court of appeals erred critically in elevating the elected state judiciary to the status of "a mystical entity" and in potraying state judges "as annointed priests set apart from the community." *Landmark Communications v. Virginia*, 435 U.S. 829, 842 (1978) (quoting *Bridges v. California*, 314

U.S. 252, 291 (1941) (Frankfurter, J., dissenting). *See also Craig v. Harney*, 331 U.S. 367, 377 (1947) ("Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected.").

The desire to give voters the ability to select the judiciary directly, through the political process, was the motivating factor behind the switch from appointive to elected state judiciaries during the heyday of Jacksonian democracy. *See generally, e.g.*, E. HAYNES, THE SELECTION AND TENURE OF JUDGES (1944); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 126-27 (2d ed. 1985); Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920, in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984). If Louisiana chooses to give voters the power to determine who sits on the state's bench, the only responsibility the federal courts have is the responsibility to ensure that its method of election complies with the federal Constitution and the Voting Rights Act.

C. *"Representativeness" Occupies a Critical Constitutional Position Within the Judicial System*

The court of appeals treated the use of the word "representatives" in section 2 as if it reflected a congressional intent to restrict section 2's coverage solely to legislative offices. Congress had quite a contrary intent: the language it chose in 1965 to define the term "vote" expressly covered the election of *every* "public office," and since that time it has repeatedly expanded, and never contracted, the Act's scope. *See supra* Parts I and II. Moreover, as the undisputed coverage of elections for such nonlegislative bodies as school boards also shows, Congress never restricted section 2 to legislative offices.

The court of appeals' cramped equation of the term "representatives" with "legislators" completely ignored two central lines of constitutional cases construing that term *in the context of state judicial systems*. For over a century, this Court's equal protection jurisprudence has sought to include African Americans within the adjudicative process

as jurors, and has explained the importance of their inclusion in terms of "representativeness." Similarly, this Court's jurisprudence under the fair cross section requirement of the Sixth Amendment has relied heavily on a conception of jurors as "representatives" of the community to explain why no distinctive group can be excluded from the venire.

In *Smith v. Texas*, 311 U.S. 128 (1940), this Court stated that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly *representative* of the community." *Id.* at 130 (emphasis added). The exclusion of African Americans from participation on juries is "at war with our basic concepts of democratic society and a *representative* government." *Id.* (emphasis added).

This Court's jury exclusion cases offer an especially salient perspective on the question of the "representativeness" of the state bench. For the past 111 years, the equal protection clause has prohibited systematic exclusion of African Americans from jury venires and petit

juries, and has required that jury venires be "representative" of the community from which they are drawn, *not* because it expects black jurors to favor black litigants, but because the system's legitimacy depends on racial inclusiveness. African Americans who are excluded from juries are denied "the equal participation in civic life that the Fourteenth Amendment guarantees." *Holland v. Illinois*, 110 S.Ct. 803, 812 (1990) (Kennedy, J., concurring). *See also, e.g., Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. . . . [and to] undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *see also Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (deliberate exclusion of African Americans from jury service is "a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others") (quoting *Strauder*, 100

U.S. at 308).[31]

This Court's applications of the fair cross section requirement of the Sixth Amendment to jury venires reflects a similar concern with ensuring the "representativeness" in the administration of justice. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court struck down Louisiana's automatic exemption of women from jury service on the ground that it denied defendants, male and female alike, a representative venire. *See also Peters v. Kiff*, 407 U.S. 493 (1972) (holding that white defendants could challenge the systematic exclusion of African Americans from the venire). The *Taylor* Court noted that "sharing in the administration of justice is a phase of civic responsibility." 419 U.S. at 531 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). And it noted the critical, if indeterminate, importance of such participation by distinct groups: "qualities of human nature and varieties of

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[31]The exclusion of a distinctive racial group from the adjudicative process may have additional ramifications when the "shared enterprise of appellate decisionmaking," *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring in the judgment), is involved, as it is in this case.

human experience, the range of which is unknown and perhaps unknowable" are lost by the systematic exclusion of a distinct group from the adjudicative process. *Id.* at 532 n. 12 (quoting *Peters v. Kiff*, 407 U.S. at 504 (opinion of Marshall, J.)).

The values that underlie racial inclusiveness in the jury context are equally important to judicial elections. The use of the word "representatives" in section 2 is entirely consistent with the inclusion of judicial elections.

First, the fact that judges, like jurors, are required to be impartial does not remove them from their critical position in the scheme of representative government. African American jurors, like all other jurors, represent the conscience of the community, but are not expected to be partisans for a distinct African American point of view. African American judges, and judges whose electoral success depended on the votes of African American voters, are similarly expected to be simultaneously representative (in the distinctive way in which judges represent the people) and impartial.

Second, to deny African American citizens the ability to participate in the process of meting out justice by denying them the ability to cast effective ballots in judicial elections is no more acceptable than denying them the ability to participate in that process by serving as jurors. *See, e.g., Carter v. Jury Commission*, 396 U.S. at 330 ("Whether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some of its citizens and deny it to others on racial grounds, than it may invidiously discriminate in the offering and witholding of the elective franchise.").

Third, the legitimacy of the state judiciary is undermined when only white citizens have an realistic role in picking judges or in serving on the bench.[32] Of course, section 2, like this Court's jury representativeness cases,

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[32]Although the jury exclusion cases that rest on the equal protection clause of the Fourteenth Amendment require a showing of discriminatory purpose, the cases that rely on the fair cross section requirement do not require a showing of discriminatory purpose. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 368 n. 26 (1978). In any event, of course, Congress has made clear that a showing of discriminatory purpose is wholly unnecessary to a claim under the Voting Rights Act. *See, e.g.*, Senate Report at 36. Thus, whether the exclusion of African Americans and African American-sponsored choices from judicial positions is intentional or inadvertent is irrelevant to its illegitimacy.

makes clear that minorities have no entitlement to proportional representation. But they must have the "same opportunity" enjoyed by white citizens to select the officials who administer justice.

V.

MANAGEABLE STANDARDS EXIST FOR ASSESSING CLAIMS OF RACIAL VOTE DILUTION IN JUDICIAL ELECTIONS

The court of appeals suggested that, because judicial elections are not governed by one-person, one-vote, there is essentially no way of assessing a claim of racial vote dilution. *LULAC*, 914 F.2d at 627. To the contrary, judicial election systems can be analyzed under the well-established, totality-of-the-circumstances test that governs other statutory claims of racial vote dilution.

The factors relevant to a section 2 claim involving judicial elections are similar to the factors relevant to assessing a section 2 claim in any other case. The facts described in the Statement of Facts dovetail with those that would support a challenge to at-large elections or

multimember districts for a school board, or county commission, or state legislature. That is hardly surprising: the way in which judges are elected in Louisiana is identical in every formal respect to the way that most other state officials are elected. Thus, petitioners showed how "social and historical conditions," including pervasive and profound racial bloc voting interacted with the multimember form of the First Supreme Court District to "cause an inequality" in their opportunity to elect the candidates of their choice. *Gingles*, 478 U.S. at 47. If, as this Court has held, "the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized," are the linchpins of a claim of dilution through submergence, *id.* at 48 n. 15, then petitioners surely alleged sufficient facts to make out a section 2 violation.

Moreover, this case shows how, even in the absence of a requirement of equipopulous districting, section 2 plaintiffs can satisfy the first prong of *Gingles*: that the minority group "is sufficiently large and geographically compact to

constitute a majority in a single-member district." *Id.* at 50. When one-person, one-vote applies, lower courts have required plaintiffs to present hypothetical districts whose deviations comply with that standard. *See, e.g., Romero v. City of Pomona*, 665 F. Supp. 853, 864 (C. D. Cal. 1987) (holding that plaintiffs' inability to provide alternatives to existing at-large system that complied with one-person, one-vote defeated their section 2 claim), *aff'd*, 883 F.2d 1418 (9th Cir. 1989).

In a situation where one-person, one-vote does not apply and a state has chosen to use districts with population deviations larger than would otherwise be permitted, the appropriate standard for determining whether plaintiffs have satisfied the first *Gingles* precondition would appear to be whether the deviations of the plaintiffs' hypothetical districts fall within the level of deviation already countenanced under the existing plan. Thus, in this case, for example, the existing single-member Supreme Court Districts in Louisiana have deviations of +43.33%, +15.33%, -3.10%, -7.40%, and -31.62%. Pet. App. 12a. Petitioners' proposed

division of the existing First Supreme Court District would create two districts--one with a -7.2% deviation and the other with a -9.3% deviation. Pet. App. 13a-14a. Since this deviation fits well within the level of deviation Louisiana has already deemed acceptable, it should suffice to establish the first requirement set out in *Gingles*.

Nor should remedial concerns limit section 2's coverage. As is set out more fully in the Brief for Petitioners in *Houston Lawyers' Ass'n v. Mattox*, No. 90-813, the propriety of single-member districts as a remedy for dilution in particular judicial election schemes is irrelevant to the question whether section 2 covers judicial elections. In any event, surely plaintiffs like the petitioners in this case should be able to challenge the use of multimember judicial districts in areas of high African American population concentrations when single-member districts are used everywhere else in the state.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the courts below: Marie Bookman; Walter Willard; Marc Morial; Henry Dillon III; the Louisiana Voter Registration/Education Crusade; Edwin Edwards, in his capacity as Governor of the State of Louisiana; James H. Brown and W. Fox McKeithen, in their capacities as Secretaries of State of the State of Louisiana; Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana; Pascal F. Calogero, Jr.; and Walter F. Marcus, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-757

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

No. 90-1032

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (90-757 Pet. App. 1a-3a) [1] is reported at 917 F.2d 187. The opinion of the district court (excerpted at Pet. App. 4a-

[1] The petition appendix in No. 90-757 contains the materials required by this Court's Rule 14.1(k). Unless otherwise noted, we will hereafter use the term "Pet. App." to refer to the petition appendix in No. 90-757.

64a) is unreported. An earlier opinion of the court of appeals (J.A. 26-44) is reported at 839 F.2d 1056. An earlier opinion of the district court (J.A. 12-25) on the merits is reported at 659 F. Supp. 183. An earlier opinion of the district court on a stay motion is reported at 690 F. Supp. 1524. Earlier opinions of the court of appeals on a stay motion are reported at 850 F.2d 1051 and 853 F.2d 1186.

The panel opinion of the court of appeals in the related case of *League of United Latin American Citizens Council No. 4434* v. *Clements* is reported at 902 F.2d 293. The en banc decision of the court of appeals in that case is reported at 914 F.2d 620 and is reprinted in the appendix to the petition (at 1a-182a) in No. 90-813.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. The petition in No. 90-757 was filed on November 14, 1990. The petition in No. 90-1032 was filed on December 28, 1990. This Court granted the petitions and consolidated them on January 18, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee

> set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

1. Louisiana elects its seven justices to the state supreme court from six judicial districts for ten-year terms. The First District, which includes Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, elects two justices at-large. Each of the other five districts elects one justice. La. Const. Art. 5, § 4; La. Rev. Stat. Ann. § 13:101 (West 1983). See Pet. App. 7a-8a; J.A. 46-47.

In September 1986, plaintiffs Ronald Chisom *et al.*, black registered voters in Orleans Parish, Louisiana, filed a complaint, alleging that the system for electing two state supreme court justices from the First Judicial District in at-large elections had the purpose and the effect of diluting black voting strength, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, the Equal Protection Clause of

the Fourteenth Amendment, and the Fifteenth Amendment. J.A. 5-11. The plaintiffs alleged that the elections in the First District, in which a majority of the population and registered voters are white, had been marked by, inter alia, racial bloc voting; that few blacks had been elected to public offices in the district; that there was no justifiable basis for singling out the First District for multi-member elections; and that the First District could be divided into two districts, each of which, like the remaining judical districts, would elect one justice. J.A. 7-9. The plaintiffs argued that an appropriate division along parish lines would produce one district—Orleans Parish—in which a majority of the population and registered voters would be black. J.A. 8, 10; Pet. App. 4a-6a.

2. The district court dismissed the complaint, holding that Section 2 of the Voting Rights Act of 1965 does not apply to judicial elections. *Chisom* v. *Edwards*, 659 F. Supp. 183 (E.D. La. 1987) (*reprinted at* J.A. 12-25). The court concluded that Section 2, by its terms, is violated only when minority voters prove that they lack an equal opportunity "to elect representatives of their choice." Section 2 therefore does not apply to judicial elections, the court held, since judges are not "representatives." 659 F. Supp. at 185-187.[2]

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[2] The district court also dismissed the plaintiffs' claims under the Fourteenth and Fifteenth Amendments, on the ground that the plaintiffs had not adequately alleged intent to discriminate. 659 F. Supp. at 187-189. The court of appeals reversed and reinstated those claims, *Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988), but after trial the district court held that the plaintiffs had not proved intentional discrimination, Pet. App. 63a-64a. Those claims are no longer at issue.

3. Plaintiffs appealed and the court of appeals reversed, holding that Section 2 applies to judicial elections. *Chisom* v. *Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom I*) (*reprinted at* J.A. 26-44). The court stated that the original language of Section 2, enacted in 1965, prohibited discrimination in any "voting qualification or prerequisite to voting or standard, practice, or procedure," and that Section 14 (c)(1) of the Act, 42 U.S.C. 1973*l*(c)(1), defined the term "voting" as applying to "any primary, special, or general election * * * with respect to candidates for public or party office and propositions for which votes are received in an election," demonstrating Congress's intent to prohibit a broad range of discriminatory electoral practices. 839 F.2d at 1059-1060. Because judges are "candidates for public or party office," the court held that the 1982 amendments to Section 2, which added the term "representatives" on which the district court relied, still applied to judicial elections. The 1982 amendments, the court concluded, did not limit the Act's scope, but instead enacted the "results" test that this Court had rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). 839 F.2d at 1060-1061. The court of appeals rejected the district court's reliance on the line of "one person, one vote" cases holding that judges are not representatives, on the ground that cases involving racial discrimination are not governed by the same considerations as cases involving nonracial reapportionment. *Id.* at 1060-1061.

The court also found relevant some secondary sources of congressional intent. For example, the court saw some indication in the legislative history of the 1982 Voting Rights Act amendments that Congress understood Section 2 to apply to judicial elec-

tions. 839 F.2d at 1061-1063. The court also relied on the holding in *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), summarily aff'd, 477 U.S. 901 (1986), that Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which requires preclearance of changes in electoral procedures in some States and which has relevant coverage language nearly identical to that of Section 2, applies to judicial elections. 839 F.2d at 1063-1064. Finally, the court noted that the Attorney General has consistently interpreted the Voting Rights Act as covering judicial elections. *Id.* at 1064.

The defendants sought review in this Court, which denied certiorari *sub nom. Roemer* v. *Chisom*, 488 U.S. 955 (1988).[3]

4. After trial,[4] the district court held that the plaintiffs had failed to prove a violation of Section 2 under the standard set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Specifically, the court held that plaintiffs had failed to prove that black voters are geographically compact or politically cohesive, or that there was significant racial bloc voting. Pet. App. 16a-62a.

5. The plaintiffs and the United States appealed, claiming that the district court's findings and con-

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[3] The district court thereafter enjoined an election scheduled for the autumn of 1988, *Chisom* v. *Edwards*, 690 F. Supp. 1524 (E.D. La. 1988), but the court of appeals stayed the injunction, *Chisom* v. *Roemer*, 850 F.2d 1051 (5th Cir. 1988), and ultimately set it aside, *Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988).

[4] The United States intervened in the district court after the remand for trial. J.A. 2; see *id.* at 45-50. The United States had participated at earlier stages of the case as an amicus curiae.

clusions were erroneous. Before the appeal was decided, however, the Fifth Circuit, sitting en banc, decided *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F.2d 620 (1990) (*LULAC*) (*reprinted at* 90-813 Pet. App. 1a-182a). The plaintiffs in *LULAC* alleged that the at-large election of trial judges in nine Texas counties diluted the ability of minority populations in each county to elect candidates of their choice, in violation of Section 2. In *LULAC*, the en banc Fifth Circuit, by a 7-6 vote, held that the Section 2 vote dilution test does not apply to the election of judges, and expressly overruled *Chisom I*.

The court held that while Section 2 generally applies to judicial elections, the vote dilution test of Section 2(b) does not, since judges are not "representatives" under Section 2(b) or as a general matter. *LULAC*, 914 F.2d at 625-627. As support for its interpretation, the court pointed out that the concept of minority vote dilution was modeled on the vote dilution standards developed in "one-man, one-vote" cases, *id.* at 627-628, and that by 1982 numerous federal court decisions, including a decision by this Court—*Wells* v. *Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court)—had ruled that "the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections," 914 F.2d at 626; *id.* at 626 n.9 (collecting cases). Applying the canon of construction that Congress is presumed to be aware of and endorse "the uniform construction" placed on a term, the majority determined that Congress used the term "representatives" in order to apply the new results test of Section 2 to elections for representative, politi-

cal offices but not to vote dilution claims in judicial contests. 914 F.2d at 628. The court found unpersuasive the fact that the definitional provision of the Act, 42 U.S.C. 1973*l*(c)(1), defined "voting" by reference to "candidates for public or party office," because the term "representatives" in Section 2 was more specific. *LULAC*, 914 F.2d at 629. Because Section 5 of the Voting Rights Act does not use the word "representatives," the majority also found irrelevant the fact that Section 5 applies to judicial elections. *Ibid.*

Six members of the en banc court, in three separate opinions, concluded that the dilution test of Section 2 applies to judicial elections. Judge Higginbotham, joined by three other judges, concluded that the term "representatives" encompasses elected judges. *LULAC*, 914 F.2d at 635-645. He nevertheless concluded that the at-large election of trial judges in Texas does not violate Section 2 since each trial judge, like each governor, occupies a so-called "single-person office" whose electorate cannot be further subdivided. In such instances, he said, electing all trial judges on an at-large basis does not dilute minority voting strength. 914 F.2d at 645-651. Concurring specially, Chief Judge Clark said that he agreed with Judge Higginbotham, adding that vote dilution analysis might be appropriate when a State elects its judges from single-member districts. *Id.* at 631-634. Judge Johnson dissented. In his view, the Section 2(b) vote dilution test applies to judicial elections, and the "single-person office" exception did not apply in the *LULAC* setting, because at the trial court level there were multiple office holders. 914 F.2d at 651-671.

6. Thereafter, the court of appeals issued a per curiam opinion in this case. Relying on *LULAC*, the

court remanded this case to the district court with directions to dismiss the Voting Rights Act claims for failure to state a claim upon which relief could be granted. Pet. App. 1a-3a.

SUMMARY OF ARGUMENT

A. The original version of Section 2 of the Voting Rights Act of 1965 covered the election of judges. Section 2 applied to any "voting qualification or prerequisite to voting or standard, practice, or procedure," while Section 14(c)(1) defined "vote" and "voting" to "include all action necessary to make a vote effective in any primary, special, or general election * * * with respect to candidates for public or party office." Together, these provisions applied to the election of any state or local officer, whether in the legislative, executive, or judicial branch. A candidate who stands in a primary or the general election for a position on a state trial or appellate court easily fits within that definition. The legislative history of the 1965 Act did not create an exception for judicial elections, and the principle that Congress intended "to give the Act the broadest possible scope," *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969), eliminates any lingering doubt.

B. The amended version of Section 2 enacted in 1982 also applies to judicial elections. Congress did not amend that law to shorten its reach; Congress revised Section 2 in order to enact the "results" test rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Congress accomplished that result by dividing Section 2 into two parts, adding to subsection (a) the term "results," and defining the new results test in subsection (b). But Congress did not alter the text of the original Section 2 defining the reach of that law ("[n]o voting qualification", etc.). Thus,

amended Section 2, like its predecessor, covers every election for public office.

The Fifth Circuit erred in *LULAC* in ruling that the term "representatives" in Section 2(b) exempts the election of judges from the results test of the statute. The legislative history of the 1982 amendments does not indicate that Congress used that term in order to limit the scope of Section 2. Congress used that term interchangeably with other terms such as "candidates" and "elected officials" to refer to elected officials, negating the suggestion that "representatives" was adopted as a term of art to describe a limited range of elected officials. The functions and responsibilities of judges obviously differ from those of other officials, but a State's decision to elect its bench indicates that the State wants to hold its judges accountable to the electorate. The Fifth Circuit also erred in relying on "one person, one vote" cases to determine that Congress excluded judges from the Section 2 results test. Congress did not rely on those decisions; instead, Congress looked to racial vote dilution cases and the principles they developed, which would apply to any elected official.

C. The thrust of the reasoning in *LULAC* and respondents' argument is that courts occupy a unique position in our government, that Congress surely was aware of and intended to protect that role when it amended Section 2 in 1982, and that Section 2 thus should not be read to treat judges in the same manner as legislators and executive officials. Those factors, however, are relevant to how the Section 2 results test applies to judicial elections, not to whether such elections are subject to the Act at all. In addition, such justifications must be examined in context. Louisiana has chosen to elect supreme court justices on a district-by-district basis, and therefore cannot

rely on the same justifications that could be invoked in the case of uniform at-large elections.

ARGUMENT

THE RESULTS TEST OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 APPLIES TO THE ELECTION OF STATE JUDGES

A. The Original Version Of Section 2, Enacted As Part Of The Voting Rights Act Of 1965, Applied To The Election Of State Court Judges

Section 1 of the Fifteenth Amendment held out the promise that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Although the text of that Amendment spoke in clear, broad terms, this Court's decisions showed that, in meeting the hard realities of the Reconstruction era and beyond, its reach exceeded its grasp. The Amendment invalidated pre-Reconstruction laws denying newly freed slaves the right to vote, but did not effectively grant blacks the franchise. Blacks were often robbed of their opportunity to participate in the political process because of a widely shared and deeply entrenched policy of excluding blacks from the ballot, the polling booth, and the party process. These efforts to deny blacks the franchise took various forms, such as outright exclusion from a polling booth, [5] physical intimidation and violence, [6]

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[5] See *United States* v. *Reese*, 92 U.S. 214 (1876).

[6] See *Ex parte Yarborough*, 110 U.S. 651 (1884).

the "grandfather clause,"[7] the "white primary,"[8] improper procedural hurdles,[9] racial gerrymandering,[10] improper challenges,[11] the discriminatory use of literacy tests,[12] and the poll tax.[13] History demonstrated that the policy of discrimination in voting was far too resilient for the Fifteenth Amendment alone to excise.

Finally, after "nearly a century of systematic resistance to the Fifteenth Amendment," Congress adopted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as a comprehensive means of enforcing the Fifteenth Amendment "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315, 328 (1966). Mindful of the protean nature of past discrimination, *id.* at 308-315; *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 118-121 (1978), Congress aimed the statute "at the subtle, as well as the ob-

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[7] See *Guinn* v. *United States*, 238 U.S. 347 (1915); *Myers* v. *Anderson*, 238 U.S. 368 (1915).

[8] See *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[9] See *Lane* v. *Wilson*, 307 U.S. 268 (1939).

[10] See *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[11] See *United States* v. *Thomas*, 362 U.S. 58 (1960), summarily aff'g *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La. 1960).

[12] See *Schnell* v. *Davis*, 336 U.S. 933 (1949); *Alabama* v. *United States*, 371 U.S. 37 (1962), summarily aff'g 304 F.2d 583 (5th Cir. 1962); *Louisiana* v. *United States*, 380 U.S. 145 (1965).

[13] See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1963).

vious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969).

To achieve that end, Congress used broad terms to define the reach of the Act. For instance, Section 2, the basic component of that law, broadly prohibited discrimination in voting, stating that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973 (1976). Section 14(c)(1) defined the crucial words "vote" or "voting" in equally broad terms, providing that they would "include all action necessary to make a vote effective in any primary, special, or general election * * * with respect to candidates for public or party office." 42 U.S.C. 1973*l*(c)(1) (1976). Taken together, the plain language of Section 14(c)(1) applies the prohibitions of Section 2 to all elections regardless of the particular function performed by the specific office at issue. As this Court stated in *South Carolina* v. *Katzenbach*, 383 U.S. at 316, "Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds." See also *Allen* v. *State Bd. of Elections*, 393 U.S. at 566-567.

The text of the Voting Rights Act of 1965 therefore clearly applies to the election of state judges at the appellate or trial levels, whether at-large or on a district-by-district basis. When a State chooses to elect judges, candidates in those elections easily fit within the statutory definition of "voting," because those persons are "candidates for public * * * office."

And while the text of the Act is clear, the principle that Congress intended "to give the Act the broadest possible scope," *Allen* v. *State Bd. of Elections*, 393 U.S. at 567, is sufficient to eliminate any doubt that might linger.

For its part, however, a deeply divided Fifth Circuit in *LULAC* concluded that the definition of the statutory term "voting" in Section 14 carried "little force" since it was "a general term buried in a definitional section far from Section 2." *LULAC*, 914 F.2d at 629. That conclusion, however, is puzzling. The term "voting" is critical to a proper understanding of the difference between the electoral process, which the Voting Rights Act reaches, and the appointive process, whether for legislative, executive, or judicial offices, to which the statute does not apply. To state the obvious, Section 2 does not apply to the method of selecting a sergeant-at-arms for the state legislature or the counsel who assist a legislative committee, even though both processes involve the selection of a legislative officeholder. The reason for non-coverage in those instances is simply that in neither case does the public vote for a candidate. By the same token, Section 2 does not reach the method of appointing state court judges, but it does apply whenever judges stand as "candidates for public * * * office." 42 U.S.C. 1973*l*(c)(1). And a definitional section—wherever "buried" in a statute—seems to us a rather logical place to look to determine the scope of the statute's reach.

Two decisions by this Court construing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, support our conclusion. The Court has twice held that Section 5, which requires certain jurisdictions to submit changes in their voting procedures to the District of Columbia district court or the Attorney General for

preclearance, applies to the election of state judges. *Martin* v. *Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court); *Brooks* v. *Georgia State Bd. of Elections*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court).[14] Congress used the same operative language (*i.e.*, "voting qualification", etc.) in defining the scope of Sections 2 and 5 of the Act. Inasmuch as Congress is presumed to give terms the same meaning throughout a statute, see *Sullivan* v.

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[14] This Court's summary affirmances are entitled to precedential value only as to the questions that were presented and necessarily decided in such cases. See, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 784 n.5 (1983); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). In both *Haith* and *Brooks* the question whether Section 5 covered changes with respect to judicial elections was presented to and necessarily decided by this Court.

In *Haith*, the defendants argued that the election of judges is not subject to Section 5 of the Voting Rights Act because judges are not subject to the "one-man, one-vote" principle and because they have functions different from those of legislators. The district court rejected that argument. 618 F. Supp. at 412. The defendants appealed the district court's judgment to this Court, and presented the question whether Section 5 applies to judicial elections. Jurisdictional Statement i (Question I), 4-15, *Martin* v. *Haith*, No. 85-1066. This Court summarily affirmed. *Martin* v. *Haith*, 477 U.S. 901 (1986). Similarly, the three-judge district court in *Brooks* held that Section 5 applies to the election of judges. The defendants appealed that judgment to this Court, and presented the question whether Section 5 applies to judicial elections. Jurisdictional Statement i (Question III), 19-21, *Georgia State Bd. of Elections* v. *Brooks*, No. 90-332. This Court again summarily affirmed. *Georgia State Bd. of Elections* v. *Brooks*, 111 S. Ct. 288 (1990). Accordingly, this Court's summary affirmances in *Haith* and *Brooks* necessarily held that Section 5 applies to the election of state court judges.

Stroop, 110 S. Ct. 2499, 2504 (1990); *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983), this Court's holdings in *Haith* and *Brooks* support the proposition that Section 2 applies to judicial elections.[15] Moreover, because Section 5 applies to the election of judges, excluding such elections from Section 2 leads, as Judge Higginbotham noted in *LULAC*, 914 F.2d at 645 (concurring in the judgment), to the "incongruous result" that a State covered by Section 5 cannot implement a new discriminatory voting procedure with respect to judicial elections, but such a discriminatory system already in effect cannot be challenged under the very statute that Congress intended to be used as the vehicle to redress such illegalities. The anomaly created by the Fifth Circuit's grudging interpretation of Section 2 suggests that Congress did not intend the law to have such curiously shifting coverage.

There is no contrary indication in the legislative history of the 1965 Act. See S. Rep. No. 162, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965); *Message from the President of the United States Relative to the Right to Vote*, H.R. Doc. No. 117, 89th Cong., 1st Sess. (1965). That should come as no surprise, in view of the broad language that Congress used to define the scope of that law. See *Allen* v. *State Bd. of Elections*, 393

[15] The district court in *Haith* expressly rejected the same type of argument that the Fifth Circuit found persuasive in this case and in *LULAC*: namely, that the election of judges is exempt from Section 5 because the "one-person, one-vote" standard applied in reapportionment cases does not apply to the election of judges. The court reasoned that "[a]s can be seen" from its text, "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413.

U.S. at 566. In sum, the original version of Section 2 clearly applied to judicial elections. *LULAC*, 914 F.2d at 637 (Higginbotham, J., concurring in the judgment).

B. The Revised Version Of Section 2, Added By The Voting Rights Act Amendments Of 1982, Also Applies To The Election Of State Judges

The Fifth Circuit did not dispute, either in this case or in *LULAC*, that the original version of Section 2 applied to the election of judges. Instead, the Fifth Circuit held in *LULAC* that Congress effectively narrowed the scope of Section 2 in the Voting Rights Act Amendments of 1982. As we explain below, that conclusion is badly off the mark. Congress did not intend to exempt judicial elections from Section 2, nor did it mistakenly pass a law that had such an unintended effect. For the reasons stated below, amended Section 2, like the original version, reaches the election of state judges.

1. *Congress added the results test to Section 2 in order to modify the elements of a violation of that law without also restricting its scope*

The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, were principally designed to reverse this Court's 1980 decision in *City of Mobile* v. *Bolden*. *Bolden* involved a vote dilution challenge brought under the original version of Section 2 against the at-large system for electing the city commission of Mobile, Alabama. The lower courts held that the at-large system was unlawful under the vote dilution standard adopted in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School*

Bd. v. *Marshall*, 424 U.S. 636 (1976), which did not require proof of intentional discrimination. This Court reversed without a majority opinion, but a plurality reasoned that the Act simply restated the constitutional standard and therefore required proof of discriminatory intent, which the plaintiffs had not proved in that case. 446 U.S. at 60-74.

Congress responded to *Bolden* by modifying Section 2 in order to enact the "results" test that this Court had rejected. S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) [hereinafter Senate Report]; *Thornburg* v. *Gingles*, 478 U.S. 30, 35, 44 n.8 (1986). Congress accomplished that goal by dividing Section 2 into two parts; by adding to subsection (a) the phrase "in a manner which results in a denial or abridgement of" the right to vote, as provided in the results test of subsection (b); and by defining that test in subsection (b) in a manner that "codif[ied] the leading pre-*Bolden* vote dilution case," *White* v. *Regester*, 412 U.S. 755 (1973). Senate Report 2.[16]

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[16] Congress also relied on a series of decisions by the courts of appeals, principally the Fifth Circuit, analyzing electoral plans under the dilution inquiry developed by this Court in *White* and the Fifth Circuit in *Zimmer* v. *McKeithen*. Senate Report 23. The Senate Report referred to a list of 23 court of appeals' decisions that applied dilution principles to multi-member or single-member districting plans. The Report stated that Congress's intent was "to incorporate that [*White*] precedent and extensive case law which developed around it, into the application of Section 2." Senate Report 32; see also, *e.g.*, Senate Report 23, 29-30, 32-33; 1 *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1216-1226 (1982) [hereinafter Senate Hearings].

At the same time, Congress did not alter that portion of the text of Section 2 defining the reach of that statute (*i.e.*, the language referring broadly to "[n]o voting qualification", etc.).[17] Congress also left alone the definition of "voting" in Section 14(c)(1), which applies the Act to every election for "candidates for public * * * office." Thus, amended Section 2(a), like its predecessor (the 1965 version of the Act), encompasses elections of every stripe; there is no categorical exclusion of judicial elections.

Nothing in the legislative history of the 1982 amendments indicates that Congress intended to cut back on the reach of Section 2. The Senate Judiciary Committee Report accompanying the Senate's version of Section 2 stated that the Committee sought to amend that section to make clear that proof of intentional discrimination is not necessary to establish a Section 2 violation, and to enact the "results" test this Court had rejected in *Bolden*. Senate Report 2. The Committee concluded that "*White*, and the decisions following it made no finding and required no proof as to the motivation or purpose behind the practice or structure in question. * * * [T]he specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." Senate Report 28. Congress revised Section 2 in order to alter the proof necessary to establish a violation of

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[17] After the amendments, Section 2(a) reads as follows (new language emphasized):

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of* the right of any citizen of the United States to vote on account of race or color * * * *as provided in subsection (b) of this section.*

that law, not to limit its scope. Nothing in the legislative history states that amended Section 2 does not apply to the election of state judges, or that the results test of Section 2(b) does not apply to such elections. The text of amended Section 2 is therefore controlling. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies*, 111 S. Ct. 615, 623 (1991); *Sullivan* v. *Stroop*, 110 S. Ct. at 2502-2503.

In sum, neither the text of Section 2 nor its purpose or history shows that Congress deliberately exempted judicial elections from the results test of that law. If, as the majority below surmised, Congress intended in 1982 to restrict the scope of Section 2 so that it no longer covered judicial elections, it is reasonable to suppose that Congress would have said so. It did not say so, because it harbored no such intent.

2. *Congress used the term "representatives" in Section 2 in order to refer to any type of elected official, not to exclude judges from the scope of that law*

In determining that Section 2's results test does not apply to judicial elections, the Fifth Circuit in *LULAC* relied heavily on Congress's use of the term "representatives" in subsection (b). The *LULAC* majority reasoned that the term "representatives" necessarily excludes elected judges, and that when it amended the Voting Rights Act in 1982, Congress knew about and relied on a line of decisions holding that the "one-person, one-vote" principle stemming from *Reynolds* v. *Sims*, 377 U.S. 533 (1964), does not apply to judicial elections because judges are not "representatives." *LULAC*, 914 F.2d at 624-629.[18]

[18] Several decisions by this Court and others have ruled that the "one person, one vote" standard of apportionment does not apply to the election of judges. See *Sagan* v. *Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982), appeal dismissed, 714 F.2d 124 (3d Cir. 1983) (Table); *Gilday* v. *Board of Elections*, 472 F.2d 214 (6th Cir. 1972); *Concerned Citizens* v. *Pine Creek Conservancy Dist.*, 473 F. Supp. 334 (S.D. Ohio 1977); *Buchanan* v. *Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972); *Wells* v. *Edwards*, 347 F. Supp. 543 (M.D. La. 1972) (three-judge court), summarily aff'd, 409 U.S. 1095 (1973); *Holshouser* v. *Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), summarily aff'd, 409 U.S. 807 (1972); *Sullivan* v. *Alabama State Bar*, 295 F. Supp. 1216 (M.D. Ala.), aff'd mem., 394 U.S. 812 (1969); *Kail* v. *Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967); *Romiti* v. *Kerner*, 256 F. Supp. 35 (N.D. Ill. 1966); *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), and vacated, 400 F.2d 882 (6th Cir.), cert. denied, 393 U.S. 839 (1968); *Stokes* v. *Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964). See generally *LULAC*, 914 F.2d at 626 n.3 (collecting cases).

Respondents make the same argument. See 90-757 Br. in Opp. 8-29. Although the argument has superficial appeal, it is ultimately mistaken.

a. Congress patterned the results test it enacted in 1982 after a passage in this Court's decision in *White* v. *Regester*, 412 U.S. 755 (1973), which involved a constitutional challenge to the election of state legislators. The relevant passage focused on the question whether minority voters "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766. Congress incorporated that principle into the Act, but substituted the word "representatives" for "legislators." Congress did not define "representatives," and thus the term should be given its "ordinary meaning." *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *Russello* v. *United States*, 464 U.S. 16, 21 (1983); *Richards*

v. *United States*, 369 U.S. 1, 9 (1962). But "representative" has more than one ordinary meaning, see *Webster's Third New International Dictionary* 1926-1927 (1986) (*Webster's*), so the question becomes what degree of generality Congress had in mind for this term when it adopted Section 2.

For example, "representative" can mean "a member of the House of Representatives of the U.S. Congress" or "a member of a house of representatives in a state legislature." *Webster's* 1926. See U.S. Const. Art. I, §§ 1-2, 4-7. Read that way, "representative" would have the same meaning as "legislator," see *Webster's* 1291, and would exclude judges. But that relatively narrow construction also would exclude a variety of executive officials that Congress intended to reach under Section 2, such as the President, state governors, city mayors, district attorneys, and county sheriffs. Those officials are not "legislators," see U.S. Const. Art. II, but can be described as "representatives." In fact, in *Myers* v. *United States*, 272 U.S. 52, 123 (1926), this Court used that precise term to describe the President. Speaking through Chief Justice Taft, the Court explained in *Myers* that "[t]he President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide." Respondents appear to agree with that proposition. See 90-757 Br. in Opp. 8 ("Members of the legislative and executive branches are certainly representatives.").

The Fifth Circuit believed that judges, in contrast to legislative and executive branch officials, cannot be "representatives" because the two roles are utterly

incompatible. Whereas legislators are properly accountable to the wishes of the electorate, judges should stand above the views of their communities and should resolve disputes and interpret the law without attempting to satisfy discrete segments of the community. *LULAC*, 914 F.2d at 625-626 (quoting Hickok, "Judicial Selection: The Political Roots of Advice and Consent," in *Judicial Selection: Merit, Ideology, and Politics* 5 (1990)). Just so. Indeed, the Fifth Circuit was entirely correct in noting that elected judges do not represent voters in the same way legislators do. But that hardly means that elected judges can in no sense be considered representatives of the community they serve. As Judge Higginbotham aptly stated, *LULAC*, 914 F.2d at 636:

> The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will. This reality belies the bold assertion that judges are in no sense representatives. The assertion that judges are not representatives actually masks a concern that judges *should not* be representatives. This is a choice left to the states. * * * While judges are indeed far removed from the logrolling give and take of the legislative and even executive processes, the effort to assure "sensitivity" and "accountability" through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law. State judges, wearing their common law hats, face decisions such as whether to adopt a comparative fault standard, and in doing so represent the people in a very real sense. At least at this level of generality judges are indisputably represen-

> tatives of voters. Saying so in no way steps on the equally indisputable difference between judges and other representatives—that judges do not represent a specific constituency.

The situation of an elected prosecutor is not dissimilar. Such an official is readily understood to be a "representative," even though his prosecutorial decisions should not be based on partisan political considerations, as the decisions of a legislator may be.[19]

"Representative" can refer to anyone elected to public office since the definition includes a person who "represents another as agent, deputy, substitute, or delegate usu[ally] being invested with the authority of the principal." *Webster's* 1926-1927. That definition encompasses judges because the State, and ultimately the public, delegates to judges the authority to adjudicate civil disputes and criminal charges. *Myers* demonstrates that it is not incorrect to describe an elected official other than a legislator as a "repre-

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[19] In our federal system, States are free to have their judges represent the community in a way that federal judges do not. Article III judges are given life tenure and salary protection precisely in order to insulate them from the sentiment of the community. But the States "are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (collecting cases). *E.g., Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-613 (1937) (Cardozo, J.). Federal law does not restrict the functions state judges can be authorized to perform, and it is a mistake to read the term "representative" in light of the "properly limited" role of federal courts. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Congress did not intend that every Section 2 case begin with an inquiry into whether the elected officials at issue are best characterized as judicial, nonjudicial, or, if they are hybrids, as predominantly one or the other.

sentative," and there is no necessary reason why a judge also cannot be characterized in that manner. A State that elects its bench endorses the view that judges should be responsible to and should express the views of the community on the policy matters that are resolved in court, and common law judges—unlike federal judges—are frequently called upon to decide questions of policy. Also, judges "do and must legislate," if "only interstitially * * * from molar to molecular motions," in order to resolve cases when statutes or decisions do not neatly fit together. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Accordingly, a system of electing judges is certainly among those situations in which the Voting Rights Act seeks to ensure that minorities are not denied an equal opportunity to participate in the political process.

This case illustrates the point. Louisiana elects its supreme court justices from various districts within the State, and each justice can readily be said to "represent" his district on that court. In fact, a 1921 Report of the Louisiana Bar Association submitted to the Louisiana Constitutional Convention used that exact term to characterize the members of the state supreme court: "Each justice and judge now in office should be considered as a representative of the judicial district within which is situated the parish of his residence at the time of his election." GX 27. The Report's use of that term indicates that a judge can properly be characterized as a "representative" even if he is not a "legislator." What is more, Louisiana's use of a district-by-district means of filling the state supreme court indicates that Louisiana has concluded that geographic diversity helps ensure that all viewpoints are adequately represented on that court. In this setting, there is nothing

unusual in treating state judges as precisely the type of "representatives" that the Voting Rights Act of 1965 was designed to cover. See *LULAC*, 914 F.2d at 633 (Clark, C.J., concurring specially).

b. The available evidence indicates that Congress used the term "representatives" interchangeably with "elected officials" or "candidates" when discussing the scope of Section 2. Congress did not use the word "representatives" as a narrow "term of art," *LULAC*, 914 F.2d at 628, but as a broader term that included all elected officials.

Following the completion of Senate Subcommittee hearings, but before the proposed amendments were sent to the full Congress, the Senate Judiciary Committee held several executive sessions at which the language that was ultimately enacted as amended Section 2 was first introduced.[20] The discussion at the executive sessions shows that Congress did not choose the word "representatives" to limit the types of elections that Section 2 would reach, since there was no discussion of any such limitation. The text that the Subcommittee considered during its hearings would have added the term "results" to Section 2, but would not have codified the *White* v. *Regester* standard in a separate subsection (b), and therefore did not refer specifically to "representatives." H.R. 3112, 97th Cong., 1st Sess. (1981), which had passed the House, would have amended Section 2 by deleting "to deny or abridge" and adding "in a manner which results in a denial or abridgement of." See 1 Senate Hearings 57. After the Subcommittee rejected the House bill, Senator Dole offered a compromise bill that ultimately became subsection (b). Senator Dole

[20] The Executive Sessions are transcribed in the Appendix to the Hearings of the Subcommittee on the Constitution of the Senate Judiciary Committee. 2 Senate Hearings.

said that he drafted the text of that proposal to calm the fears of some opponents to the House bill that a results test would lead to proportional representation. See 2 Senate Hearings 60-62. He noted, however, that his text effectively retained the results standard of the House bill. *Id.* at 62. Thus, subsection (b) was not drafted in order to scale back the reach of subsection (a), but simply to make clear that the amended Section 2 did not require the proportional election of minority candidates. The important language in subsection (b) was not "representatives," but "of their choice" (versus "of their race").

Neither the Senate nor the House read the proposed version of amended Section 2 as limited to "legislators." The Senate Report used the terms "candidates" or "elected officials" interchangeably with the term "representatives" when discussing Section 2. *Mallory* v. *Eyrich*, 839 F.2d 275, 279-280 (6th Cir. 1988).[21] Senator Hatch, the Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee, which held hearings on the legislation, wrote a separate report on the proposed amendments to Section 2 in which he also used the term "candidates" when describing the Senate bill. Senate Report 100.[22] Sen-

[21] See Senate Report 28 ("If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect *candidates* of their choice, there is a violation of this section.") (emphasis added); *id.* at 30 ("candidates"), 31 ("candidates"), 32 ("representatives"), 67 ("candidates"). See also *id.* at 67 n.222, citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971) ("legislative candidates").

[22] Indeed, Senator Hatch's Subcommittee published its own report on the legislation, in which it criticized the results test. The Report stated that it would apply to "*all* governmental units, including * * * judicial districts." Senate Report 151. While the legislation that was before the Subcommittee did

ators Dole, Kennedy, and Mathias, the principal sponsors of amended Section 2, see 128 Cong. Rec. 14,114 (1982), consistently used the word "candidates"—not "representatives"—when discussing the proposed legislation during the floor debates.[23] Other Members of Congress also referred to "candidates," rather than "representatives," when discussing the bill.[24] No one expressed any intent to use the term "representatives" as a means of excluding judicial elections from the dilution inquiry of *White* v. *Regester*. The absence of any mention of such a limitation on the reach of the dilution test strongly suggests that none was intended. Cf. *Dillard* v. *Crenshaw County*, 831 F.2d 246, 250-251 (11th Cir. 1987) ("Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official.").

Although the Fifth Circuit believed that Congress relied on the line of cases holding that the "one person, one vote" theory is inapplicable to judicial elections, *LULAC*, 914 F.2d at 628-629, there is, in fact,

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not have the language that became subsection (b), Senator Hatch, commenting on the compromise with subsection (b) offered by Senator Dole at the executive sessions, said that "[t]he impact of the proposed compromise is not likely to be one wit different than the unamended House provision relating to section 2." 2 Senate Hearings 70 (Sen. Hatch). Clearly, neither the proponents nor opponents of the legislation intended that the word "representatives" would exclude judges.

[23] See 128 Cong. Rec. at 14,114 (Sen. Mathias); *id.* at 14,132 (Sen. Dole); *id.* at 14,140 (Sen. Kennedy); *id.* at 14,291-14,292 (Sen. Kennedy); *id.* at 14,316 (Sen. Dole).

[24] *E.g.*, *id.* at 13,127 (Sen. Hatch); *id.* at 14,133 (Sen. Thurmond); *id.* at 14.934-14,935 (Rep. Sensenbrenner). See *id.* at 13,131 (Sen. Hatch refers to "officeholders").

no evidence of such reliance. Nowhere in the legislative reports and debates did any member of Congress rely on those decisions. Instead, Congress relied explicitly on a list of 23 cases, principally from the Fifth Circuit, that had applied the vote dilution standard adopted by this Court in *White* v. *Regester* and by the Fifth Circuit in *Zimmer* v. *McKeithen*. The Senate Report noted that there is "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify. * * * These 23 cases represent the actual judicial understanding and application of the *White* standard codified in the Committee bill." Senate Report 32. See also *id.* at 23, 31, 33. An examination of those cases demonstrates that Congress did not choose the term "representative" in order to limit the reach of Section 2. The courts used the terms "representatives," "candidates," and "officeholders" interchangeably with no indication that the term "representatives" had the limited meaning that term was given in the apportionment line of cases. See also *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971) (referring to "legislative candidates").[25]

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[25] For example, the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, which was prominently mentioned in the legislative history, Senate Report 23, 33, referred to "representatives" and "candidates." 485 F.2d at 1305, 1307. *United States* v. *Board of Supervisors*, 571 F.2d 951 (5th Cir. 1978), referred to "elected officials" and "candidates," and said that "the court must also be aware of the fact that supervisors' beat lines also form the election districts for individual county officeholders, such as *justice court judges* and constables." *Id.* at 956 n.9 (emphasis added). See also, *e.g.*, *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973) ("candidates" and "public office"); *Moore* v. *LeFlore County Bd. of Election Comm'rs*, 502 F.2d 621 (5th Cir. 1974) ("public office");

Nor is there any reason to think that Congress incorporated "one person, one vote" principles as the guidepost for Section 2. Malapportionment cases address issues of "substantial equality of population," *Reynolds* v. *Sims*, 377 U.S. at 559; they do not address questions of racial discrimination or the effective cancellation of a person's vote because of that discrimination. For example, in *White* v. *Regester* this Court reversed the finding that a state reapportionment plan violated "one person, one vote" standards, but sustained a finding of racial vote dilution. Similarly, *Gaffney* v. *Cummings*, 412 U.S. 735, 751 (1973), and *City of Mobile* v. *Bolden*, 446 U.S. at 65, 78 (plurality opinion), each stated that the "one person, one vote" principle was inapplicable to a claim of racially based vote dilution. The Senate Report recognized that the concept of geographic vote dilution began with this Court's decision in the *Reynolds* case, but nevertheless concluded that racial vote dilution cases involve a materially different type of constitutional violation. Senate Report 20-21.[26]

Bradas v. *Rapides Parish Policy Jury*, 508 F.2d 1109 (5th Cir. 1975) ("elected officials"); *Wallace* v. *House*, 515 F.2d 619, 629, 631 (5th Cir. 1975) ("candidates" and "representatives"), vacated on other grounds, 425 U.S. 947 (1976); *Perry* v. *City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) ("public office"); *David* v. *Garrison*, 553 F.2d 923 (5th Cir. 1977) ("representatives" and "candidates"); *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir. 1977) ("candidates"); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc) ("elected officials," "county officers," "representatives," and "candidates"), cert. denied, 434 U.S. 968 (1977).

[26] In fact, Senator Hatch disavowed reliance on *Reynolds*, stating that the concept of vote dilution articulated in *Reynolds* "is an entirely different concept than the one that has evolved under provisions of the Voting Rights Act. * * * The *Reynolds* and [Voting Rights Act] notions of 'vote dilution'

And the only circuit court decision before 1982 addressing the question whether a vote dilution claim concerning the election of judges should be analyzed under malapportionment principles rejected reliance on the "one person, one vote" line of decisions. *Voter Information Project* v. *City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

Finally, there is other circumstantial evidence that Congress did not exempt judicial elections from amended Section 2 by using the term "representatives." The House and Senate hearings on the 1982 Amendments contain various references to judicial elections, principally in the context of statistics indicating the progress made by minorities under the Act in such elections up to 1982.[27] In addition, 41 States elect some or all of their judges, see *The American Bench* (M. Hough 4th ed. 1987-1988), and the Members of Congress presumably are aware of the electoral practices in their own States. Under these circumstances, it is reasonable to expect that Congress would have discussed why judicial elections should be exempted from amended Section 2 if Congress intended to do so, particularly since *only* judicial elections are exempt under the Fifth Circuit's interpretation of the Act. Cf. *Sheet Metal Workers Int'l Ass'n* v. *Lynn*, 488 U.S. 347, 356 (1989). The

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have nothing in common but the name." 128 Cong. Rec. 13,129 (1982).

[27] See, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); 1 Senate Hearings 208-209, 669, 748, 788-789, 1228, 1769, 1777, 1781.

fact that Congress did not do so, like the fact that the dog did not bark, is significant; it serves as a strong indication that Congress did not exempt such elections from Section 2.[28]

c. The Fifth Circuit in *LULAC* indicated that while the Section 2(b) results test does not apply to judicial elections, the general prohibition on racial discrimination in voting in Section 2(a) is still applicable. *LULAC* reasoned that, prior to 1982, Section 2 prohibited only discriminatory tests or devices. The two phrases that Congress inserted into Section 2(b) in 1982 from this Court's decision in *White* v. *Regester*—"opportunity to participate" and "opportunity to elect"—*LULAC* went on to say, actually described two different types of violations: The first phrase described only the pre-1982 ban on racial discrimination in voting, and the second phrase expanded Section 2 by adopting the vote dilution standard. The election of judges is exempt only from the latter provision, *LULAC* concluded, because the Act used the term "representatives" only in that regard. 914 F.2d at 624-625.

"The short answer" to that proposition "is that Congress did not write the statute that way." *Russello* v. *United States*, 464 U.S. at 23. Congress did not limit the scope of the results test to "representatives" in order to exempt judges due to the unique

[28] See Arthur Conan Doyle, "Silver Blaze," in *The Complete Sherlock Holmes* (1927). Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

nature of the judicial office. The unique functions that judges perform can be taken into consideration as part of the Section 2 results test, as we have explained in our amicus brief in *Houston Lawyers Ass'n* v. *Attorney General*, No. 90-813 (consolidated with *League of United Latin American Citizens* v. *Attorney General*, No. 90-974), cert. granted (Jan. 22, 1991).[29] But Congress drafted Section 2 in a manner that allows a plaintiff to attempt to prove a violation of the Act under a vote dilution theory in the case of any elected official. Accordingly, if elected judges are "representatives," as we submit they are, then the Section 2 results test is applicable.

In addition, the Fifth Circuit's conclusion (that the language drawn from *White* v. *Regester* described two different types of violations) is incorrect. *White* v. *Regester* was a dilution case; it had nothing to do with tests or devices; and both phrases—which appear side-by-side in the Court's opinion, see 412 U.S. at 765-766—were used to describe the dilution inquiry. As Judge Higginbotham explained, "the statutory language cannot be parsed to read that judicial elections are not subject to dilution claims, but *are* subject to the remaining strictures of Section 2." *LULAC*, 914 F.2d at 643 (concurring in the judgment). The Fifth Circuit's analysis also gives the statute an odd construction, creating an artificial and litigation-provoking distinction between practices that affect "participation" and that affect "electing." Finally, the 1982 amendments did not "expand" Section 2 to cover practices that the Act did not previously reach; those amendments enacted the "results" standard while maintaining Section 2's existing coverage.

[29] We have provided a copy of our amicus brief in *LULAC* to counsel in this case.

C. The State's Strong, Nondiscriminatory Reasons For The Structure Of Its Judicial System Are Among The "Totality Of Circumstances" That The Courts Must Consider Under Section 2

The thrust of the reasoning of the majority and concurring opinions in *LULAC* (and the contention made by respondents here) is that the courts occupy a unique position in our government, one that Congress surely was aware of and intended to protect when it amended Section 2 in 1982. That submission draws strength from the axiom that the judiciary exemplifies the principle that ours is a government of laws, not men, and the corollary that courts must impartially administer justice without concern for the political considerations that are grist for the mill in the other branches. Since courts do and should stand above politics, the argument goes, the Voting Rights Act should not be read in a manner that treats the judiciary in the same manner as the legislative and executive branches.

That argument, we believe, is a powerful one. It is certainly true that concern over the outcome of judicial elections was not the triggering event that led Congress to revise Section 2 in 1982. Instead, Congress amended the statute principally to address the problem that racial vote dilution had consistently defeated the efforts of minorities to be elected to positions like the city commission of Mobile, Alabama. It is also fair to assume that Congress was aware of the unique role that the courts play in our democratic form of government. Congress, this Court has noted, is "'predominantly a lawyer's body,' *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), and it is appropriate for us 'to assume that our elected representatives . . . know the law.' *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697

(1979)." *Albernaz* v. *United States*, 450 U.S. 333, 341 (1981). That is important because it has been one of our fundamental rules of law since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that courts have a unique role in our government. The 1982 Amendments did not abandon that principle. At the same time, the conclusion to which the foregoing argument leads—*i.e.*, the election of judges is exempt from Section 2—is far broader than what the text of the Act permits or what Congress intended.

In our view, the fact that elected judges have functions different from those of elected legislative or executive officers—and that States may structure their electoral practices with those functions in mind—are legitimate factors that a court must weigh among the "totality of circumstances" when adjudicating a Section 2 challenge to judicial elections. The manner in which Section 2 applies to such elections therefore may well differ from the way that the Act applies in the case of other elected officials. In other words, the reasons set forth by the majority and concurring opinions in *LULAC* for exempting judges from the Section 2 results test are factors for courts to consider when applying that test, even though they are not persuasive reasons for exempting judges from Section 2 altogether.

Our amicus brief in the companion *LULAC* case addresses this matter in the context of the at-large election of Texas district judges. There, we argue that a State's strong, nondiscriminatory interests in having a judiciary that is representative, impartial, and perceived as such by the community, are important factors for courts to consider under the "totality of circumstances." Because those state interests are

legitimate and "strong," *Zimmer* v. *McKeithen*, 485 F.2d at 1305, if not compelling, they could spell the difference between a violation of Section 2 and a lawful electoral scheme.

This case, however, is materially different from *LULAC*. Unlike Texas district court judges, the justices of the Louisiana Supreme Court are not elected on a statewide at-large basis; they are elected from six separate judicial districts within the State, even though the Louisiana Supreme Court has statewide jurisdiction. This electoral system shows that Louisiana has made a choice that differs from the one made by Texas. Louisiana believes that its supreme court will best represent the community and best carry out its judicial function if the justices are elected from different geographic regions within the State. Whatever the validity of the interests Texas advances for its at-large electoral system, those interests are inapplicable here.

Accordingly, regardless of the outcome in *LULAC*, if this Court holds that Section 2 applies to the election of judges, a remand is necessary in this case in order to permit the court of appeals to review the district court's finding that the plaintiffs did not establish a Section 2 violation. The court of appeals has not yet addressed any of the district court's findings, and the court of appeals should be afforded the initial opportunity to do so.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1990

RONALD CIBSON, ET AL.,

Petitioners,

versus

CHARLES E. ROEMER, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

versus

CHARLES E. ROEMER, ET AL.,

Respondents.

On Writs Of Certiorari To the United States Court Of Appeals For The Fifth Circuit

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April 5th, 1991

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QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

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STATEMENT OF THE CASE[1]

Petitioners [hereinafter collectively "CHISOM"] brought this suit in the United States District Court for the Eastern District of Louisiana on behalf of all black registered voters in Orleans Parish, approximately 135,000 people. [Joint Appendix Pages 5, 8 (hereinafter "J.A. #")]. The suit challenged the at-large election of two Justices to the Louisiana Supreme Court from the parishes of Orleans, St. Bernard, Plaquemines and Jefferson (the First Supreme Court District) as being in violation of the 1965 Voting Rights Act, as amended, because of alleged dilution of the voting strength of CHISOM. [J.A. 5-6]. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 1973. The action sought declaratory

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[1] The private petitioners, Ronald Chisom, et al., have presented the following Question:

> Does section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, cover elections for judicial office?

Respondents present the following question:

> Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

Respondents do not take the position that Section 2 of the Voting Rights Act as initially enacted in 1965 was not applicable to the state judicial electoral process. The original Section 2 is coterminous with the Fifteenth Amendment to the United States Constitution, which binds everyone. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). It is the "results" test set forth in Section 2(b) which the respondents have always contended was not intended to embrace state judicial electoral processes.

Perhaps the question was better and more succinctly put by the Solicitor General:

> Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

and injunctive relief, 42 U.S.C. §§ 1973 and 1983. CHISOM prayed for relief under 28 U.S.C. §§ 2201 and 2202 and the Fourteenth and Fifteenth Amendments to the United States Constitution. **[J.A. 6]**. CHISOM sought the division of the First Supreme Court District into two districts, one to be comprised of the parishes of Jefferson, Plaquemines and St. Bernard and the other of Orleans Parish where blacks constituted a majority (51.6%) of the registered voters. **[J.A. 8]**.

After the complaint was filed, respondents, Edwards, et al. [hereinafter collectively "ROEMER"], filed a Fed.R.Civ.P.12(b)(6) motion to dismiss for the failure of CHISOM to state a claim upon which relief could be granted. The district court agreed with ROEMER's contention that Congress did not intend to apply the word "representatives" in Section 2 of the Voting Rights Act, as amended, to embrace members of the judiciary. *Chisom v. Edwards,* 659 F. Supp. 183 (E.D. La. 1987). **[J.A. 12]**. The district court drew a distinction between the impartial functions performed by the judiciary without a constituency and the functions performed by representatives who are not expected to be impartial but rather reflective of the needs and wishes of their constituency. 659 F. Supp. at 186. **[J.A. 21]**.

The district court further held that CHISOM lacked the requisite allegations necessary to prove a violation of the Fourteenth and Fifteenth Amendments of the Federal Constitution because CHISOM claimed alleged discriminatory effect instead of discriminatory intent. **[J.A. 25]**. The district court granted CHISOM ten days to amend the complaint to cure this defect; no such amendment was forthcoming.

CHISOM appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the district court and remanded the case because the appellate court concluded that Section 2 does apply to the election of state court judges. The appellate court also resurrected the federal constitutional claims. *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir. 1988). **[J.A. 26]**.

ROEMER filed both an application for rehearing and a suggestion for rehearing *en banc.* Pending a decision thereon, CHISOM moved for an injunction to arrest a pending election in the First Supreme Court District. ROEMER contended that the motion was improper because the district court continued to have jurisdiction concerning an injunction. Both rehearing applications were denied by the appellate court on May 27th, 1988. At the same time, CHISOM's motion for an injunction was denied because CHISOM failed to comply with F.R.App.P.8(a).

ROEMER then filed a Petition for a Writ of Certiorari in this Court. *Roemer v. Chisom,* 57 U.S.L.W. 3162 (U.S. Aug. 23, 1988) (No. 88-327).

Pending this Court's consideration of the petition, CHISOM sought an injunction in the district court to prevent the scheduled election. During the argument therefor, the district court granted unopposed class certification and granted the injunction. *Chisom v. Edwards,* 690 F. Supp. 1524 (E.D. La. 1988). ROEMER's motion for a stay was denied by the district court, and ROEMER appealed the injunction order to the Fifth Circuit. There a motion to stay was granted. *Chisom v. Roemer,* 850 F.2d 1051 (5th Cir. 1988). At this point the case was simultaneously in the district court, the Fifth Circuit, and this Court.

While the injunction issue was pending in the Fifth Circuit and the Petition for a Writ of Certiorari was pending in this Court, the UNITED STATES applied to the district court for permission to file a Complaint in Intervention pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000b-2. **[J.A. 45-49]**. The application was granted on August 8, 1988. Thereafter, CHISOM filed a Motion for Summary Judgment, which was opposed by ROEMER and subsequently denied by the district court.

The injunction was reversed by the Fifth Circuit. *Chisom v. Roemer,* 853 F.2d 1186 (5th Cir. 1988). A Motion for Rehearing and a Suggestion for Rehearing *En Banc* filed by CHISOM were denied on September 14, 1988.

This Court denied ROEMER's Petition for a Writ of Certiorari on November 14, 1988. 488 U.S. 955 (1988).

The district court then proceeded to a bench trial on the merits. The court considered the evidence as reflected through the testimony of several witnesses, six of whom were qualified as experts, 109 Stipulations of Fact as agreed to by the parties, six exhibits introduced by CHISOM, including expert reports, forty-seven exhibits introduced by the UNITED STATES, including an expert report, and four exhibits introduced by ROEMER, including expert reports.

In crafting its opinion, the district court took into consideration all three of the threshold tests in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as the "totality of circumstances" criteria from *Thornburg*.[2] The district court first addressed the minority group's obligation to prove ***that it is sufficiently large and geographically compact to constitute a majority in a single-member district.*** 478 U.S. at 50. With population size as the stipulated indicia of an ideal district, the district court found that the deviations would be as follows using various combinations of parishes:

Orleans Parish .....-7.2%

Jefferson, Plaquemines and St. Bernard Parishes .....-9.3%

* * *

Orleans and St. Bernard Parish .....-3.4%

Plaquemines and Jefferson Parishes.....-20.0%

* * *

Plaquemines, St. Bernard and Orleans Parishes [with, however, a black voter registration of only 45.3%] 1.1%

Jefferson Parish .....-24.3%

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[2] In explaining its reasons for this exhaustive evidentiary approach the district court stated "*Monroe v. City of Woodville*, No. 88-4433, slip op. (5th Cir. Aug. 30, 1989), suggests that the

(Continued on following page)

[Appendix to Petition for a Writ of Certiorari, *Chisom v. Roemer* [hereinafter "App."] 13a-14a].

The district court concluded:

> Thus, if two districts were drawn without crossing parish boundaries (as is the case in the rest of the state) and if the "ideal district" were based upon population alone, no single member district may fairly be drawn in which blacks would constitute a majority of the voting age population and registered voters. Either Jefferson Parish or Orleans Parish would have to be isolated in such a districting scheme, leaving a second district with an atypically low voter population. Moreover, to date, no parish is isolated as a single district in this state. The Court does not find any of the suggested divisions of the First District to be a particularly "ideal" result. It appears the only way to provide a sizable single member district in which blacks would constitute a voting age majority would be to create a gerrymandering district lacking geographical compactness.

[App. 15a-16a] (footnotes omitted).

The district court then turned to and considered the two other *Thornburg* threshold tests together – that a minority group must prove ***that it is politically cohesive*** **and** ***that the white majority votes sufficiently in a bloc to enable it to usually defeat the minority's preferred candidate because the minority's submergence in a white multi-member district impedes the minority's ability to elect its chosen representative.*** 478 U.S. at 51. The district court initially stated:

(Continued from previous page)

Court need not reach the *Thornburg* totality of the circumstances inquiry, if it finds that the plaintiffs fail to establish all three elements of the initial 3-part test in *Thornburg*. This Court nonetheless makes the following findings, in part to provide a full record of findings and in part because the inquiry into these elements overlaps to some extent the inquiry into political cohesion and bloc voting." **[App. 21a, n.30]**.

> The Court finds that the judicial elections are sufficiently different from elections for legislative and administrative offices to warrant caution in making inferences about voter behavior using the techniques employed to analyze voter polarization and vote dilution in those other types of elections. In particular, judicial elections as contrasted to those other elections are characterized by lower turnout, higher roll-off rates and less voter interest. For example, analyses of the level of competition for judicial offices compared to state legislative offices within the four parish area of the First Supreme Court District during the past decade indicate that almost 64 percent of judicial races have been uncontested, whereas only 30 percent of state senate and house of representative elections have gone uncontested. The number of candidates for judicial offices is particularly low in the election years when the terms of incumbent judicial officers expired.

[App. 17a-18a] (footnotes omitted).

The district court then looked at voter registration, concluding:

> In sum, notwithstanding historic disenfranchisement, voter registration since 1965 has demonstrated generally increased participation by black voters, and today no state action or laws prevent black participation in the electoral process. In the summer of 1984, the most recent analysis of voter registration by race showed over seventy percent of both races are registered to vote and that the gap in between black and white voter registration continues to close. In fact, as previously indicated, black voter registration now exceeds white voter registration in Orleans Parish.

[App. 25a].

The district court then looked at the history of the First Supreme Court District. The First Supreme Court District, consisting of the city of New Orleans and its

surrounding environs, has been the only district that has elected two Justices since adoption of the 1879 Louisiana Constitution more than 110 years ago **[App. 25a]**; *see* La. 1879 Const. art. 82. In each of the Constitutions since then, this districting plan has been "readopted without objection." **[App. 26a]**.[3]

The most recent Louisiana Constitution took effect in 1974 after the 1973 Louisiana Constitutional Convention. Twelve of the 132 delegates to the Convention were black. **[App. 27a]**. During the Convention three amendments were proposed to divide the Supreme Court into single-member districts. The first was defeated 85-27, with one black delegate voting for the proposal, eleven against, and one absent. **[App. 28a]**. The second was defeated 67-47, with seven blacks voting for the amendment, four against, and one absent. **[App. 28a]**. The final amendment proposed splitting the First Supreme Court District into two districts, with one Justice to be elected from each. When a white delegate argued in favor of the proposal, a black delegate from Orleans Parish responded that the present arrangement should not be changed. **[App. 28a-29a]**. This amendment was defeated 63-50, with five blacks voting for the amendment and seven against. **[App. 29a]**. The final districting plan, leaving the First Supreme Court District with two Justices, was adopted 103-9, with eight blacks voting for the plan, one against, and two absent. **[App. 29a]**. Four of the blacks voting for the plan were delegates from Orleans Parish. The lone black who voted against the plan was from East Baton Rouge Parish.

The proposed Constitution was ratified by the voters of Louisiana on April 20th, 1974, **[App. 29a]**, and was precleared by the United States Department of Justice on

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[3] *See* La. 1898 Const. art. 87; La. 1913 Const. art. 87; La. 1921 Const. art. 7, § 9; and La. 1974 Const. art. 5, § 4.

November 26, 1974.[4] A proposed constitutional amendment to split the district with Orleans Parish constituting a district by itself was defeated by the Louisiana voters in October, 1989, with the unofficial Associated Press totals showing a vote of 151,342 for the amendment and 451,845 against the amendment. *Baton Rouge State-Times*, October 9th, 1989. In Orleans Parish the amendment was defeated by a three-to-one majority, with 16,526 voting for the amendment and 46,354 voting against the amendment. *New Orleans Times-Picayune*, October 8th, 1989.[5]

The district court next discussed ***3. Other Discrimination*** and addressed both the legal profession's accessibility by blacks and, as to higher education, took judicial notice of the court's own Order and Reasons in *United States v. State of Louisiana*, 692 F. Supp. 642 (E.D. La. 1988), concerning a higher dual education system in Louisiana.[6] **[App. 30a-32a]**.

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[4] Defendant's [ROEMER's] Exhibit No. 4, admitted April 5, 1989, Trial Transcript p. 6; *see also Chisom v. Edwards*, 690 F. Supp. 1524, 1525 & n.4 (E.D. La. 1988).

[5] Given that Orleans Parish at that time had majority black registered voters (53.6%), **[App. 11a]**, and given that the amendment was defeated three to one in Orleans Parish, it is fair to surmise that blacks in Orleans Parish opposed this constitutional amendment which would bring about the very same remedy sought by CHISOM in this case.

[6] This Order of August 1, 1988, was subsequently vacated by this same district court, by an Order issued on October 30, 1990, which reads, in pertinent part:

> [T]he Court VACATES its Order of August 1, 1988, DENIES summary judgment in favor of the United States, GRANTS summary judgment in favor of all defendants, and DIRECTS the clerk to enter herewith final judgment in accordance with this order.

United States of America v. State of Louisiana, et al., No. 80-3300 (E.D. La. October 30, 1990) (footnotes omitted).

The district court next turned to ***4. Recent Access to Political Candidacy.*** After discussing several political contests within the First Supreme Court District, the district court noted, "[T]he significance of black candidacy must be remarked, however recent its development" **[App. 36a]**; and, that "[n]otwithstanding Louisiana's history of discrimination, the recent careers of several of New Orleans' black politicians demonstrate the increased access minority members have had to local political processes, including the judiciary. While such success is usually due to large support by the black community, the white vote has contributed significantly to the election of black candidates." **[App. 37a-38a]**. The district court concluded this section of its Opinion with:

> The above facts show many areas of judicial office in which black candidates have not participated. However, this Court is not prepared to make a blanket finding of restricted access to candidacy, given recent elections of Orleans Parish Criminal Court Judges and Orleans Traffic Court Judges, blacks have crossed race lines.
>
> The Court further notes that there is no suggestion or record evidence of racial overtones or appeals in judicial or other elections, nor of a lack of responsiveness on the part of judges or other elected officials to the particularized needs of the members of the minority group.

[App. 42a].

The district court analyzed First Supreme Court District elections, finding that in the 1974, 1980 and 1988 primary and general elections "the candidate supported by a majority of black voters was elected in each instance." **[App. 45a]**. The district court also examined two 1972 First Supreme Court District races in which blacks had been candidates:

> Although no statistical evidence was presented concerning the racial voting patterns in the 1972

special election for the First Supreme Court District, a black candidate ran for both of the available seats. One candidate, Judge Ortique testified that there was a substantial number of blacks who crossed over and supported the white candidate. Judge Ortique received 27,648 votes (14.0%) in the First Supreme Court District and 21,744 votes (20.7%) in Orleans Parish. From the statistics that are available concerning the 1972 special election, it appears that there was a black crossover in the election for the second Supreme Court seat in the First District. In that election, Mr. Amedee, the only black candidate, received only 11,872 votes (5.8%) in the First Supreme Court District and 8,997 votes (8.5%) in Orleans Parish, revealing that there was even a greater black crossover vote than in the Ortique/Calogero race.

Based upon the foregoing, the Court finds there is no pattern of racial bloc voting in the four most recent elections for Supreme Court Justice from the First Supreme Court District. [**App. 45a-46a**].

The trial court also found there was no usual pattern of defeat for the black minority's preferred candidate in the 75 other judicial elections within the four parishes of the First Supreme Court District between 1978 and the present. [**App. 46a**]. Instead, the minority candidate of choice had been elected in 62.7% of the contested elections. [**App. 47a**]. The trial court concluded that:

> Ecological regression analyses for 34 judicial elections (24 primaries and 10 general elections) show that there is significant crossover voting among both white and black voters in judicial elections. A considerable number of black voters do not always support the black candidate, nor do the white voters always support the white candidate.

[**App. 47a**] (footnote omitted).

The trial court then examined exogenous elections, concluding:

Cross-over voting by voters of one race to support candidates of another race is occurring increasingly in Orleans Parish elections for non-judicial offices indicating a pattern of both white and black voters to look at factors other than the race of candidates in making election choices.

Cross-over voting by white voters to support black candidates for non-judicial offices in Orleans Parish occurs on a regular basis with the result that black candidates frequently win parish-wide offices such as mayor, councilman at-large, and school board posts.

Roll-off in Orleans Parish judicial elections by black voters is sometimes large enough to prevent black candidates from winning elections in which white candidates participate.

Moreover, black and white voters in Orleans Parish participate at approximately equal rates in recent elections for major office (President, U.S. Senate, Governor, and Mayor). [**App. 51a-52a**].

After making all these findings, the district court made the following factual conclusion:

> Based upon the totality of circumstances before the Court, the Court is unable to find, and the plaintiffs, for the reasons hereinabove stated have failed to prove by a preponderance of the evidence as a factual matter, that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive geographically insular minority group.

[**App. 52a**] (footnote omitted).

After undertaking a "searching practical evaluation of past and present reality," with a functional view of the "political process", [**App. 52a**], the district court concluded: "[t]he Court is of the opinion plaintiffs have failed to prove by a preponderance of the evidence, the existence of racial bloc voting as a matter of law". [**App. 61a**]. The district court then stated:

> Plaintiffs would have the Court create an amoeba-shaped, wholly-metropolitan district unique among the Supreme Court districts in the state for the sole purpose of guaranteeing a black justice. In concluding, the Court stresses that the plaintiffs' goal appears wholly contrary to the express proviso in section 2 that "nothing in this section establishes a right to have [blacks] elected in numbers equal to their proportion in population.". . . . . .Proof of racially discriminatory intent or purpose is required to show a violation under either the fourteenth or fifteenth amendment. Plaintiffs have failed to prove as a matter of law that the present system by which Louisiana Supreme Court Justices are elected was instituted with specific intent to dilute, minimize or cancel the voting strength of plaintiffs. It is clear that an invidious discriminatory purpose was not a factor at all in the legislative decision to provide a multi-member district for the Louisiana First Supreme Court District. Such being the case, plaintiffs have failed to prove any constitutional violation from the operation of the present voting scheme.

[App. 62a-64a] (citations omitted).

CHISOM and the UNITED STATES filed separate appeals to the Fifth Circuit on the voting rights claim. Neither appealed the consti'utional claims. This case and *League of United Latin American Citizens, et al. v. Clements, et al.* [*"LULAC"*] were both argued on April 30, 1990. The panel decided *LULAC* on May 11, 1990. 902 F.2d 293 (5th Cir. 1990). Four days later the Fifth Circuit *sua sponte* ordered an *en banc* hearing in *LULAC*. 902 F.2d 322 (5th Cir. 1990). The *LULAC en banc* court held that the results test as set forth in Section 2(b) could not be applied to the Texas state court judges because judges are not "representatives". 914 F.2d 620 (5th Cir. 1990) (*en banc*), *cert. granted,* ___ U.S. ___, 112 L.Ed.2d 838 (1991). **[App. 65a-99a]**. The *LULAC en banc* court also overruled *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988).

The Fifth Circuit then ordered this case remanded to the district court with instructions to dismiss all claims under the Voting Rights Act for failure to state a claim upon which relief may be granted. 917 F.2d 187 (5th Cir. 1990). **[App. 1a-3a]**.

On remand, the district court dismissed the voting rights claims of both CHISOM and the UNITED STATES, *Chisom v. Roemer,* 86-4075 (E.D. La. Sept. 13, 1989) (Order of Dismissal), whereupon each filed separate petitions with this Court for a Writ of Certiorari to the Fifth Circuit. Certiorari was granted as to each Petition on January 18, 1991, and the two cases were consolidated.

SUMMARY OF THE ARGUMENT

The original version of Section 2 of the Voting Rights Act of 1965 prohibited a state or a political subdivision thereof from imposing or applying any voting qualification, prerequisite to voting, or any standard, practice, or procedure which denied or abridged the right of any citizen of the United States to vote on account of race or color or language minority group membership. This section was coextensive with the Fifteenth Amendment to the United States Constitution. *City of Mobile v. Bolden,* 446 U.S. 55, 60-61 (1980). ROEMER does not take the position that this Section 2 was inapplicable to state judicial electoral processes.

In amending Section 2 of the Voting Rights Act in 1982, Congress fashioned two separate and distinct standards by which vote dilution cases were to be tried. If the electoral system under challenge relates to the selection of members of the state judiciary or to issue oriented matters such as annexations, deannexations, referendums, taxation, bond issues, etc., discriminatory intent must be proven. On the other hand, if the electoral system under challenge relates to the selection of individuals who perform representative functions, such as legislators and executives, discriminatory results alone are sufficient to establish vote dilution.

Had Congress wanted to specifically include the election of state court judges within the results proof standard as set forth in Section 2(b) of the Voting Rights Act, Congress could have used a term such as "elected officials" or "candidates" rather than "representatives". Instead, however, Congress, itself a representative body, chose a word which Congress, of all institutions, would understand – "representatives" – a word which appears nowhere else in the Voting Rights Act. A judge is simply not a representative.

When Congress in confecting legislation uses language the meaning of which is clear and unmistakable, courts must consider such language conclusive when engaging in statutory construction.

This Court has held that judges are not "representatives". Lower federal courts have repeatedly reached the same conclusion. Further, throughout American history, legal scholars and historians have concluded that the concept of judges as "representatives" is foreign to the American political system. The judiciary is not expected to be nor may it be a mirror of public sentiment. Judges do not draw for their decisions from a public opinion poll, a dampened finger to the wind, or an ear to the ground. Their constituency is limited to the blindfolded lady with the sword and scales.

This Court has repeatedly held that Congress must expressly state any intention to alter the federal-state balance. Subjecting judges to Section 2(b) of the Voting Rights Act would, in the words of the *LULAC en banc* decision, strike "at federalism's jugular." No such express intention is evident in the 1982 amendment to the Act.

Further, had Congress intended to subject the judiciary to § 2(b), Congress would have addressed the difficult problems involved in such an application. There is no evidence that Congress considered the drastic changes that application of § 2(b) would make in the nature and functioning of a state's judiciary.

Making judges representatives in the same sense as are executives and legislators could destroy the independent role of the judiciary, a factor which is crucial to the proper functioning of a constitutional government. Public opinion rather than judicial opinion will become the hallmark of justice.

The "one man, one vote" standard has never been applied to the judiciary. On each occasion when the issue has been presented, this Court and other courts have uniformly held that the standard is not to be applied to the judiciary. Without the measure of individual voting strength provided in legislative cases by the one man, one vote rule, the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986) – demonstration by the minority group "that it is sufficiently large and geographically compact to constitute a majority in a single-member district" – is meaningless in the judicial context. It is always possible to construct a geographically compact black voting majority district by continuing to reduce the total population in that district down to, if necessary, a minimum of one. There are no "judicially discernable and manageable standards" by which a court could find that a given judicial election system does *not* dilute minority voting strength if the population size of the hypothetical single-member subdistrict can be contracted or expanded at will. As one lower court has held, "An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

The most that can be said about the relationship of Section 5 of the Voting Rights Act (which was enacted by Congress in 1965 and extended without change in 1982) and Section 2(b) (which was enacted by Congress seventeen years later in 1982) is that they both form a part of the Voting Rights Act, as amended. The test for the application of each is entirely different. This distinction is readily understandable for Congress created the sections at different times and for different purposes. Senator Robert Dole, the author of the compromise language which became Section 2(b), stated during the Senate

Hearings that the "effects" test in Section 5 was different from the "results" test in Section 2(b).

ARGUMENT

I. Congress Did Not Intend Section 2(b) Of The Voting Rights Act Amendments Of 1982 To Apply To The Judiciary.

A. Section 2 Of The Voting Rights Act Of 1965 Sets Forth An Intentional Discrimination Standard.

Section 2 of the Fifteenth Amendment to the Constitution granted Congress the power to enforce the Fifteenth Amendment by appropriate legislation. This Congress did by the passage of the Voting Rights Act of 1965. The original version of Section 2 prohibited a state or a political subdivision thereof from imposing or applying any voting qualification, prerequisite to voting, or any standard, practice, or procedure which denied or abridged the right of any citizen of the United States to vote on account of race or color or language minority group membership. This Court has held that Section 2 did not reach beyond the Fifteenth Amendment to the United States Constitution, stating: "[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). *City of Mobile* also held "that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Id.* at 62, *citing Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The Fifteenth Amendment and the original Section 2 were both clearly applicable to the judiciary and to all other elective processes. ROEMER does not take the position that Section 2 of the Voting Rights Act as initially enacted is inapplicable to state judicial electoral processes.

B. Section 2(b) Of The Voting Rights Act Amendments Of 1982 Sets Forth A "Results" Test Which Is Applicable Only To The Choice Of "Representatives".

In 1982 Congress amended the Voting Rights Act, creating two alphabetized subsections. The first, designated "(a)", restated the test of the original Section 2 which prohibited a state or a political subdivision thereof from imposing or applying any voting qualification, prerequisite to voting, or any standard, practice, or procedure which denied or abridged the right of any citizen of the United States to vote on account of race or color or language minority group membership. This language, like the original Section 2, is coterminous with the Fifteenth Amendment. Under subsection "(a)" the intent standard thus remains unchanged. 42 U.S.C. § 1973(a).

The second alphabetical subsection "(b)" created a new and additional standard of proof, which relaxed the intent standard of proof as required in subsection "(a)", by providing a "results" test for elections involving the choice of "representatives". Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), states:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a

protected class elected in numbers equal to their proportion in the population.

Justice O'Connor noted in her concurring opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that "[a]mended § 2 is intended to codify the "results" test employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and to reject the "intent" test propounded in the plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980)." 478 U.S. at 83. In adopting this "results" standard in Section 2(b), Congress drew upon this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), for the applicable language.[7] This language was inserted by Senator Dole as a compromise.[8] A

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[7] The Senate Report states:

> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.
>
> . . . .
>
> In adopting the "result standard" as articulated in *White v. Regester*, the Committee has codified the basic principle in that case as it was applied prior to the *Mobile* litigation.

Voting Rights Act Amendments of 1982, S.Rep. No. 97-417, 97th Cong., 2d Sess. 27, 28, *reprinted in* 1982 U.S. Code Cong. & Admin. News 205.

[8] *See Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112*, 97th Cong. 2d Sess. Vol. II, pp. 80-81 (May 4, 1982).

comparison of the language in *White* and that in Section 2(b) is set forth below:

White v. Regester	*Section 2(b)*
The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.	A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or elections in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice.

By amending Section 2 of the Voting Rights Act, Congress fashioned two separate and distinct standards by which vote dilution cases were to be tried. If the electoral system under challenge relates to the selection of members of the state judiciary or to issue-oriented matters such as annexations, deannexations, referendums, taxation, bond issues, etc., discriminatory intent must be proven. On the other hand, if the electoral system under challenge relates to the selection of individuals who perform representative functions, such as executives and legislators, discriminatory intent can, but need not be proven, for discriminatory results alone are sufficient to establish vote dilution.

1. Where Statutory Language Is Clear, A Court Must Adopt The "Plain Meaning" Of A Statute.

Congress thus changed the word "legislators" in *White* to "representatives" in Section 2(b), "a term which is employed only at this spot and appears nowhere else in the entire Voting Rights Act." *LULAC* (*en banc*), 914 F.2d at 628. Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "candidate" which appears elsewhere in the Act[9] for the term "representatives" which appears only in Section 2(b).

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[9] Other sections of the Voting Rights Act consistently use the term "candidate" in generically referring to all those standing for elections:

> "No person . . . shall intimidate, threaten, coerce, . . . [any] person to vote for, or not to vote for, any candidate . . . at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate." 42 U.S.C. § 1971(b).
>
> "When used in this subsection, the word 'vote' includes all action necessary to make a vote effective . . . with respect to candidates for public office." 42 U.S.C. § 1971(e).
>
> "The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate . . . " 42 U.S.C. § 1973(i)(e)(2).
>
> "The terms 'vote' or 'voting' shall include all actions necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . having [a] ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office . . . " 42 U.S.C. § 1973(l)(c)(1).

In construing the statutory language, in this case the meaning of the term "representatives", this Court has held repeatedly that there is no need to resort to an examination of legislative history when the statutory language is clear and unmistakable.[10] Examples of such holdings include:

> We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt

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[10] The majority opinion in *LULAC* (*en banc*) recognized that the legislative history was of no real help:

> Thus, as Justice Scalia has very recently suggested, we "appl[y] to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point. . . . " *Begier v. I.R.S.*, ___ U.S. ___, 110 S.Ct. 2258, 2269, 110 L.Ed.2d 46, 63 (1990) (concurrence in judgment).
>
> And these small matters are indeed scourings. The panel opinion avers, 902 F.2d at 299, and we do not doubt, that the reference to "judicial districts" is the sole reference to the judiciary in all the legislative history of the 1982 amendments of the Act. It will be noted that even this reference is one to judicial *districts*, not to judicial candidates; and in our Circuit many officials such as sheriffs, highway commissioners, district attorneys and clerks of court, who are "representatives" and not judges, are elected from judicial districts, *e.g.*, Miss.Code Ann. (1972) 65-1-3.

914 F.2d at 630 n.14 (emphasis in original). The only reference to "judicial districts" was in a subcommittee report hostile to the amendments. 914 F.2d at 630. "This Court does not usually accord much weight to the statements of a bill's opponents." *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19, 29 (1988); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 n.13 (1973) (Marshall, J., in chambers); *see also Kelly v. Robinson*, 479 U.S. 36, 50 n.12 (1986) ("We decline to accord any significance to these statements [by witnesses in hearings]").

of the meaning of the words used. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935).

[T]here is no need to refer to the legislative history where the statutory language is clear. . . . "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Ex Parte Collett*, 337 U.S. 55, 61 (1949) (citations omitted).

We must adopt the plain meaning of a statute, however severe the consequences. *Jay v. Boyd*, 351 U.S. 345, 357 (1956).

We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772 (1984).

[W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language. . . . If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is "a clearly expressed legislative intent to the contrary." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983) (citations omitted).

There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute. *Public Citizen v. Department of Justice*, 491 U.S. 440, 469 (1989) (Kennedy, Rehnquist, and O'Connor, JJ., dissenting).

The question thus becomes whether the term "representatives" is unambiguous. It would, indeed, be difficult to cast about for a word whose meaning was less in doubt than that selected by Congress as a substitute for "legislators" when Congress chose the word "representatives", a word of simple interpretation and one used extensively by Congress in the enactment of legislation.

Had Congress been in doubt as to the meaning of its selected term, Congress could have turned to any dictionary, or thesaurus, for the word's meaning or synonym. For example, one dictionary published a year before the 1982 amendments defines "representative" as "one that represents a constituency as a member of a legislative or other governing body." *Webster's Third New International Dictionary*, 1926 (1981).

2. This Court Has Held That The "Plain Meaning" Of "Representatives" Does Not Include "Judges".

The majority in *LULAC* (*en banc*) held that Congress knew that judges are not considered to be "representatives":

> By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987). Against this background, then, the Congress deliberately picked a term of art for use in amending Section 2 that up to that time had been universally held, and which it *knew* had been universally held by every federal court that had considered it as of that date, neither to include judges nor to comprise judicial offices.

914 F.2d at 628 (emphasis in original).

This Court held that judges are not "representatives" in affirming a three-judge court voting rights decision

that the "one man, one vote" concept does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095 (1973). In refusing to apply "one man, one vote" precepts, the three-judge court reasoned as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3 (1966)]:
>
> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 153.

Wells v. Edwards, 347 F. Supp. 453, 455-56 (M.D. La. 1972) (three-judge court).

Similarly, Justice Frankfurter has stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 575 (1951) (Frankfurter, J., concurring in the judgment). Justice Stewart has contrasted the Court's duty with that of the people's representatives:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31 (1965) (Stewart, J., dissenting) (emphasis supplied).

The judiciary is not intended to be representative of and responsive to the populace; instead, the judiciary is required to be independent of pressures of any constituency or interest group. The need for such independence

has been the reason for holding judges immune for performing judicial acts. *See, e.g., Butz v. Economou*, 438 U.S. 478, 508-09 (1978); *Stump v. Sparkman*, 435 U.S. 349, 355 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). The authors of the U.S. Constitution created such independence in the federal judiciary:

> The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislative – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication remained impartial.
>
> . . . .
>
> In sum, our Constitution unambiguously enunciates a fundamental principle – that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provided clear institutional protections for that independence.

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58, 60 (1982). More recently, this Court stated that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

3. Other Federal Courts Have Held That The "Plain Meaning" Of "Representatives" Does Not Include "Judges".

As stated, this Court has held that judges are not representatives. Other federal courts have repeatedly reached a similar conclusion. The plaintiffs in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three-judge court), attacked the North Carolina system of nominating judges by districts and electing them statewide, contending that it denied voters equal protection of the laws, citing, inter alia, *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). The court distinguished these and other cited cases because they "dealt

with the election of the representatives of the people – officials who make laws, levy and collect taxes, and generally manage and govern people." 335 F. Supp. at 930. After discussing two precedents involving reapportionment, the court stated:

> While *Buchanan [v. Rhodes,* 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed,* 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)] and [*New York State Association of Trial Lawyers v.] Rockefeller* [267 F. Supp. 148 (S.D.N.Y. 1967)], deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

335 F. Supp. at 932. The *Holshouser* decision was affirmed by this Court. 409 U.S. 807 (1972).

A similar system of electing judges in Georgia was upheld in *Stokes v. Fortson,* 234 F. Supp. 575 (N.D. Ga. 1964) (three-judge court). The court stated:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business

> of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

234 F. Supp. at 577.

In two New York cases plaintiffs sought judicial reapportionment on the basis of population, again relying on legislative reapportionment cases. In *New York State Association of Trial Lawyers v. Rockefeller,* 267 F. Supp. 148 (S.D.N.Y. 1967), the court rejected the comparison, stating that:

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> . . . .
>
> In contrast to legislative apportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

267 F. Supp. at 153-54; *accord, Kail v. Rockefeller,* 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three-judge court) (quoting the *Trial Lawyers* opinion's statement that the state judiciary is not "responsible for achieving representative government").

The Ohio judicial structure guaranteeing each county at least one judge in the court of general jurisdiction came under attack in *Buchanan v. Rhodes,* 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed,* 385 U.S. 3 (1966), *vacated,* 400 F.2d 882 (6th Cir. 1968), *cert. denied,* 393 U.S. 839 (1968). Once again, the complaint was predicated upon the Supreme Court's reapportionment cases. The court noted that when representatives to a legislative body are malapportioned, the voting strength of individual citizens becomes unequal, causing a dilution of power. 249 F.

Supp. at 865. Judges, however, are not governed by such a rule:

> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people.

249 F. Supp. at 865.[11]

Less than four months after a panel for the United States Court of Appeals for the Fifth Circuit decided that judges were "representatives" when the *Chisom* case was first before the Fifth Circuit, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), another panel of the Fifth Circuit held that judges are not "representatives":

> Of course, Mr. Hatten is running for judge. Judges, even if elected, do not serve a primarily representative function.

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[11] Other decisions making a similar distinction between judges and representative officials include *Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of the one man, one vote concept to judicial selection in Ohio); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n.6 (D.R.I. 1975) (holding one man, one vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (three-judge court) (rejecting application of one man, one vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three-judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary").

Hatten v. Rains, 854 F.2d 687, 696 (5th Cir. 1988). The concurrence added, "As Judge Goldberg says, judges are not representatives". *Id.* at 696. (Garwood and Jolly, specially concurring).

4. The Fundamental Difference Between "Representatives" And Members Of The Judiciary Is Deeply Rooted In This Country's History.

In holding that "the judiciary serves no representative function whatsoever," 914 F.2d at 625, the *LULAC en banc* Court quoted Professor Eugene Hickok's statement that, "The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive." E. Hickok, "Judicial Selection: The Political Roots of Advice and Consent" in *Judicial Selection: Merit, Ideology and Politics* 5 (National Legal Center for the Public Interest 1990), *quoted at* 914 F.2d at 926. Other scholars have also recognized this difference.

Professor G. Edward White wrote in *The American Judicial Tradition* that the American judicial tradition emerged with Chief Justice John Marshall.[12] A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White added:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence was not merely a side effect of federalism but a first principle of American civilization. . . . Against the potential chaos attendant on mass participatory democracy, republicanism erected

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[12] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

> the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Another Founding Father, Alexander Hamilton, "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the democratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some of the Founding Fathers thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has also been applicable to the state judiciary. State constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Chief Justice Roger Traynor of the California Supreme Court wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, *quoting* Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L.Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this

political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. By contrast, legislatures "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' " *Judicial Tradition* 322. Justice Felix Frankfurter has called the judiciary the "antidemocratic, unrepresentative" branch of government. *Judicial Tradition* 367.[13]

Various legal theorists have also stated that judges are not "representatives." In *Democracy and Distrust*[14] Professor John Hart Ely contrasted the function of the courts with the role of the representative branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch (the judiciary) would review legislation to review the motivation of the representative branch (the legislature) to make sure that the views of all groups were represented in lawmaking. He concluded: "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

In *The Supreme Court and the Idea of Progress*[15] Professor Alexander Bickel spoke of the importance of judicial independence:

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[13] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in both federal and state governmental systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[14] Page references are to the 1980 Harvard University Press hardbound edition.

[15] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears – dogmatic, arbitrary, irrational, self- or group-centered – that so often enchain other public officials. . . . The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court with the people and its representatives, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.[16]

Last month, in discussing appointments to the federal bench, former U.S. Court of Appeals Judge Robert Bork stated, "[t]he courts are not supposed to be representative institutions." 77 *ABA Journal* 20 (March 1991).

5. This Court Has Repeatedly Held That Congress Must Expressly State Its Intention when Passing Legislation Altering The Federal-state Balance, And Making Section 2(b) Applicable To The Judiciary Would Constitute Such An Alteration.

Making state elected judges subject to a constituency would constitute drastic federal interference with the current role of such judges and would remove their independence. This Court has stated that Congress must

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[16] Never in Professor Bickel's lengthy section on reapportionment is there any intimation that reapportionment requires judicial redistricting. *Supreme Court and Progress* 35, 158-59, 168-73. Indeed, such a notion would run counter to his strong arguments for judicial independence.

expressly state its intention when passing legislation altering the federal-state balance. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 549-50 (1985); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *United States v. Bass*, 404 U.S. 336, 349 (1971); *Greenwood v. Peacock*, 384 U.S. 808 (1966).

Less than two years ago, this Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), cited with approval this Court's statement in *United States v. Bass*, 404 U.S. 336, 349 (1971):

> that "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

491 U.S. at 65.

The *LULAC en banc* decision stated that no such "clear statement" could be found in § 2(b):

> It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed. Instead, as regards the issue in this case, our investigation reveals an all but total absence of relevant legislative history and a statutory text that unambiguously excludes elections of non-representative state officers from Section 2's highly intrusive results test. If this was not the intended effect of Congress's substitution of *representatives* for *legislators* in Justice White's language, no other suggests itself; and we must reject any notion that Congress went to all the trouble of selecting that language and carefully modifying it, just so far and no further, randomly and with nothing particular in mind. It is

> never proper for us to extend a statute's force by construction into areas where Congress has not seen fit or has been unable to agree to go, and never less proper than in such supremely sensitive territory as this.

914 F.2d 620, 630-31 (5th Cir. 1990).[17]

6. Had Congress Intended To Make Section 2(b) Applicable To Judges, Congress Would Have Addressed The Difficult Problems Involved In Such An Application.

As the lower courts have recognized in their decisions,[18] judges do have a unique position in our governmental system and application of Section 2(b) of the Voting Rights Act to the judiciary poses special problems. The Justice Department has also recognized this unique role of the judiciary and repeatedly demonstrated discomfort with the notion that judges ought to be treated like everyone else under Section 2(b) of the Voting Rights Act.[19] Surely if Congress had intended that Section 2(b) of

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[17] *Thornburg v. Gingles*, 478 U.S. 30 (1986), is this Court's definitive opinion on the meaning and scope of § 2(b). In *Thornburg*, this Court did not consider Congress's use of the word "representatives" to be random and superfluous; indeed, the Court used the term often in delineating its opinion. *See, e.g.*, 478 U.S. at 35, 41, 46, 48 n.14, 51, and 73.

[18] *See, e.g., Clark v. Edwards*, 725 F. Supp. 285, 294 (M.D. La. 1988); *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988) ("The basic tenets in remedying violations for legislative districts as set forth in the body of case law are applicable to this case, but the Court finds that there are additional considerations in judicial cases that require greater emphasis on some factors").

[19] In an amicus brief filed with the Fifth Circuit when this case was first before that court, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), the Justice Department said:

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the Voting Rights Act would apply to judges, Congress would have debated at length the difficult problems, including the difficult remedy problems, that immediately arise in the application of Section 2(b) to the judiciary.[20]

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> None of this is to say, however, that judicial elections are covered by Section 2 in precisely the same way as other elections are. The differing function of judges from other elected officials makes different the range of factors to be considered in determining if a Section 2 violation has occurred. . . . The precise range of the difference in treatment between judges and other officials raises difficult problems.

pp. 19, 20. Similarly, in its Brief on the Merits in this case, the United States writes:

> Since courts do and should stand above politics, the argument goes, the Voting Rights Act should not be read in a manner that treats the judiciary in the same manner as the legislative and executive branches.
>
> That argument, we believe, is a powerful one. . . . It is also fair to assume that Congress was aware of the unique role that the courts play in our democratic form of government.

p. 34.

[20] This Court held as follows concerning the significance of the absence of Congressional debate on another sensitive area involving the federal-state balance, the overriding of sovereign immunity:

> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. . . .

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These remedy problems have not been addressed in *Chisom* because the district court ruled in favor of the defendants after a trial on the merits. The remedy problems have been discussed at length in a lawsuit challenging the at-large selection of district judges and court of appeals judges in Louisiana. *Clark v. Edwards*, 725 F. Supp. 285, 287 (M.D. La. 1988). Section 5 aspects of *Clark* are before this Court,[21] and a petition for certiorari concerning the Section 2 aspects of the *Clark* case is pending.[22]

The usual judicially-imposed remedy in Section 2(b) and reapportionment cases involving an at-large elected system has been to elect the governmental entity by single-member districts.[23] Use of single-member judicial

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> We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

Quern v. Jordan, 440 U.S. 332, 343 (1979).

[21] *Clark v. Roemer, jurisdiction noted*, ___ U.S. ___, 112 L.Ed.2d 838 (1990).

[22] *Clark v. Roemer, petition for cert. filed*, 59 U.S.L.W. (U.S. Dec. 7, 1990) (90-898).

[23] "We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances." *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976); *accord, Connor v. Finch*, 431 U.S. 407, 414, 415 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). "We are fully persuaded, however, that the same considerations which have induced this Court to express a preference for single-member districts in court-ordered reapportionment plans designed to remedy violations of the one-person, one-vote rule compel a similar rule with regard to court-imposed reapportionments designed to cure the dilution of the voting strength of racial minorities resulting from unconstitutional racial discrimination." *Wise v. Lipscomb*, 437 U.S. 535, 541 n.5 (1978).

sub-districts, however, poses almost insuperable problems, as *Clark* demonstrates. The plaintiffs in that lawsuit proposed as their preferred remedies multi-member sub-districts or single-member sub-districts. Ultimately, the district judge chose sub-districts as the remedy. *Clark v. Roemer*, No. 86-435 (M.D. La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, p. 52). The judge pointed out some of the problems inherent in such a remedy:

> Creation of such subdistricts obviously generates other problems, such as compactness, equality of population, need for future modification because of additional judgeships or population changes and the potential or perceived potential for small election districts leading to "home town" justice, to name a few.

Clark v. Roemer, No. 86-435 (M.D. La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, p. 49).

All of these problems are serious. Possibly the most difficult to solve are the problems involved with the "need for future modification because of additional judgeships or population changes." The sub-districts drawn in *Clark* were based on population and voting age population figures. Changes in population and the racial composition of population in sub-districts will inevitably occur. Thus, what may be a minority sub-district today may not be a minority sub-district tomorrow, requiring periodic redrawing of sub-district lines. Further, judges may fear that as such redrawings occur, they will be placed in the same sub-district and forced to run against each other. They might therefore compete with one another to make sure that they do not write unpopular opinions.

Further redrawing will be necessary as judges are added. Most governmental bodies (such as city councils, county governments, school boards, and the like) remain the same size. Judges, however, are added as the caseloads increase. *Clark v. Edwards*, 725 F. Supp. 285 (M.D.

La. 1988).[24] If judges are elected from single-member sub-districts, each time a judge is added in a judicial district, all of the sub-districts will have to be redrawn.[25]

The district judge in *Clark* also mentioned the problem of actual or perceived "home town" justice, meaning that the electorate for a sub-district will be much smaller than the electorate for a judicial district, and that there will be the appearance (and possibly the reality) of "neighborhood judges" who are influenced by their constituency and the source of their campaign funds. Because of a fear of "home-town cooking", litigants may understandably opt more often for jury trials, clogging the court docket and slowing down the judicial process, as well as creating the need for more judges. And, as judges are added, lines will need to be re-drawn making the sub-districts smaller, which then increases the "neighborhood judge" problem so that more litigants will

[24] Redrawing of sub-districts could conceivably mean that two federal courts would continue to supervise a state's judiciary. Presumably, the district court in which the Section 2 lawsuit was brought would retain jurisdiction for re-drawing because of population changes and changes in the racial composition of the population in the districts and sub-districts. This Court has affirmed a three-judge court opinion that addition of new judges requires preclearance under Section 5 of the Voting Rights Act. *Brooks v. Georgia State Board of Elections*, No. C.V. 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, ___ U.S. ___, 112 L.Ed.2d 243 (1990). Disagreements between a state and the Department of Justice regarding the appropriateness of adding the prospective judge and redrawing of existing sub-districts because of the addition of the new judge would be heard by the United States District Court for the District of Columbia. *See* 42 U.S.C. § 1973c.

[25] Even with multi-member sub-districts, as a judge is added, the population per judge across the sub-districts within a district will no longer be approximately equal, so the lines will have to be withdrawn.

choose a jury trial – in short, creating a vicious (and extremely expensive) circle.

Another remedy suggested in *Clark* is limited voting. Under limited voting a voter can only vote for some of the positions on the ballot. Such a system would itself appear to violate the Voting Rights Act, which provides that nothing in the applicable subchapters "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C. § 1973n.[26] Limited voting was rejected as a judicial remedy in Voting Rights Act cases, including *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988), and *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).[27] Further, the district judge in *Clark* rejected it as a Section 2 remedy, after hearing uncontested testimony that it exists in only approximately 200 of the more than 86,000 local governmental units in this country. *Clark v. Roemer*. No. 86-435 (M.D.La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, pp. 51-52.)

Surely had Congress intended that the judiciary was to be covered by Section 2(b), Congress would have adverted to some or all of the problems listed above.

[26] As Chief Judge Parker held in rejecting limited voting for the alleged Section 2 violations in Louisiana's judicial system, "this court finds it difficult to comprehend how we expand access to the ballot box by limiting the number of votes each elector may cast." *Clark v. Roemer*, No. 86-435 (M.D. La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, p. 52).

[27] Pennsylvania has determined that limited voting for judges violates its Constitution. *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983).

II. As Long As This Court Holds That The "One Man, One Vote" Principle Does Not Apply To State Judicial Electoral Selection Processes, The Vote Dilution Proof Concept Enshrined In Section 2(b) Of The Voting Rights Act, As Interpreted And Applied In *Thornburg v. Gingles*, 478 U.S. 30 (1986), Cannot Apply To The Judiciary.

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *affirmed*, 409 U.S. 1095 (1973), rejected application of the "one man, one vote" test to the judiciary. The district court in *Wells* held as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)]:
>
> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153.

347 F. Supp. at 455-56; *accord*, *Holshouser v. Scott*, 335 F. Supp. 928, 932 (M.D.N.C. 1971) (three-judge court), *aff'd. mem.*, 409 U.S. 807 (1972); *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three-judge court); *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153-54 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839 (1968); *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964) (three-judge court).

The express language of the plurality opinion in *Thornburg*, as well as that of the concurring opinions, shows that Section 2(b) of the Voting Rights Act enshrines the "one man, one vote" principle as the touchstone test for determining vote dilution. In speaking for the

plurality, Justice Brennan set forth a three-part test for determining what type of evidence is necessary under Section 2(b) to prove a violation:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as a minority candidate running unopposed . . . usually to defeat the minority's preferred candidate. . . . In establishing this last circumstance, the minority group demonstrates that the submergence in a white multi-member district impedes its ability to elect its chosen representatives.

478 U.S. at 50-51.

This test requires an analysis of vote dilution by use of a hypothetical single member district, a district which must meet a one man, one vote test.

As Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger recognized in their concurring opinion in *Thornburg*, this three-fold test (and its implicit one man, one vote standard) equates to a requirement of proportional representation, i.e., one man, one vote. Justice O'Connor, speaking for these Justices, stated:

> Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.
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> . . . .
>
> In my view, the Court's test for measuring minority voting strength and its test for vote

dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2.

. . . .

The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of the single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multi-member district as it could elect under the most favorable single-member district scheme, *it follows that the Court is requiring a form of proportional representation.*

478 U.S. at 85, 94 and 97 (emphasis supplied).

The concept of dilution of group voting strength [which is embodied in subsection (b) of amended Section 2] rests on two assumptions: (1) that each person's vote should have the same weight as another person's vote, and (2) that a given (protected) group should wield roughly the aggregate voting strength of its members. *See Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973). The second assumption depends on the validity of the first. Without the assumption of substantial equality among voting shares made possible by the one man, one vote principle, no aggregate measure of minority voting strength – and therefore no measure of dilution of that strength – is conceivable. Since the one man, one vote rule does *not* apply to the judiciary, the conceptually dependent notion of minority group vote dilution,

embodied in subsection (b), has no field of operation in judicial elections.

This argument has nothing to do with statutory interpretation, does not depend on a particular construction of the word "representative" as used in subsection (b), and is not based on whether Congress intended that amended Section 2 have some field of operation with respect to judicial elections. Instead, this argument is based on the fact that minority group vote dilution – as that concept has developed in the voting rights jurisprudence – simply cannot exist unless the one man, one vote rule applies.

In her concurring opinion in *Thornburg*, Justice O'Connor, joined by Justices Powell, Rehnquist, and Chief Justice Burger, notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Thornburg*, 478 U.S. at 88. There is no doubt that the yardstick adopted by the *Thornburg* court – a calculation of the minority's potential voting strength in a single-member district system – rests on the assumption that the one man, one vote rule applies and that each district has roughly the same population. *See* 478 U.S. at 50-51 n.17. Otherwise, to paraphrase Justice Harlan, the Court would be unable even to measure what it purports to equalize. *Whitcomb v. Chavis*, 403 U.S. 124, 169 (Harlan, J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one man, one vote rule, *Thornburg*'s test is meaningless in the judicial context. Since, under *Wells*, state judicial districts need not be equal in size, a state could *always* theoretically draw a district in which blacks constitute a voting majority by continuing to reduce the district geographically until blacks comprise a voting majority of the district. Indeed, there is, effectively, no "judicially discernible and manageable standard" by which a court could find that a given voting system does *not* dilute minority voting

strength if Section 2(b) applies to judges – and, thus, minority vote dilution claims are simply not justiciable given the *Wells* ruling.

> As the Fifth Circuit held in *LULAC* (*en banc*):
>
> Absent the one-person, one-vote rule – that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside – there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.
>
> The notice of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), White v. Regester, [412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)], and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote – the guarantee of substantial equality among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

914 F.2d 620, 627 (emphasis in original).

The Senate Report concerning the 1982 amendment to the Voting Rights Act states "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S.Rep.No. 417, 97th Cong. 2d Sess. 19, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196.

The key issue, therefore, is whether Section 2(b) of the Voting Rights Act enshrines the "one man, one vote"

principle as the touchstone test. If it does, then it cannot be used to analyze judicial elections, because the "one man, one vote" test was expressly rejected as applying to the judiciary in *Wells v. Edwards*. 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *affirmed*, 409 U.S. 1095 (1973).

III. The Experience Of The Courts In Applying Section 5 Of The Voting Rights Act Is Not Relevant In Determining The Interpretation Of Section 2(b).

Section 2 of the Voting Rights Act, as amended, created a "results" test while the unamended Section 5 of the Voting Rights Act has always applied an "effects" test. The two sections serve entirely different purposes. Section 5 has a limited applicability – only to specific targeted states where voting statutory changes may not occur without "first demonstrating to a federal instrumentality that the change will be nondiscriminatory." *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 121 (1978). Unlike Section 2, Section 5 does not use the term "representatives." Indeed, the term "representatives" appears nowhere in the Voting Rights Act, except in Section 2(b). "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *Lockhart v. United States*, 460 U.S. 125, 133 (1983). Section 2(b), however, applies to the voting statutes of all states regardless of when such statutes were enacted.

A Section 2 violation must be established through a full judicial evidentiary hearing, in which the plaintiff carries the burden of proof. A Section 5 determination is made initially administratively, mostly through correspondence. If the Section 5 change is found objectionable, then the finding is subject to judicial review in the United States District Court for the District of Columbia, with the state bearing the burden of proof.

There was no determination by Congress that the "results" test under Section 2(b) would be identical to the "effects" test under Section 5:

> The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: Does the "results" test proposed in section 2 mean the same thing as the "effects" test in section 5? Despite the fundamental importance of this matter, there has been disagreement among witness after witness on this.
>
> . . . .
>
> During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results tests in section 2 was similar or identical to the effects test in section 5, and hence that the judicial history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar.

Report of the Subcommittee on the Constitution to the Committee on the Judiciary on S. 1991, 97th Cong., 2d Sess., pp. 31-32 (April 1982).

Distinguished witnesses at the Congressional hearings testified that there were distinct differences between the tests in the two sections. Julius Chambers answered unequivocally on this point:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?
>
> Chambers: They are not the same test . . .

> Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
>
> Chambers: That is correct.

Id. at 31-32.

Similarly, Professor Archibald Cox observed:

> If you mean the effects test as interpreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.

Id. at 32.

Senator Robert Dole, author of the compromise language for Section 2(b), stated during the Senate Hearings that the Section 5 "effects" test was different from the "results test" of *White v. Regester*, 412 U.S. 755 (1973), and that the House Report had been ambiguous concerning which test would apply under Section 2(b). *See Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112*, 97th Cong. 2nd Sess. Vol. II, pp. 80-81 (May 4, 1982). His compromise language carried forth the *White* "results" test by directly codifying language from the *White* decision. *Id.*

The results test, as authoritatively interpreted by this Court in *Thornburg*, is a purely statistical analysis test[28]

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[28] The tri-part *Thornburg* test allows a plaintiff to use only statistical analysis to meet the burden of proof. 478 U.S. at 50, 51. The minority group must demonstrate that it is able to constitute a majority in a single member district; it must show it is politically cohesive (i.e. that it votes as a bloc; for these purposes statistical analysis of racially polarized voting is acceptable, 478 U.S. at 56); and it must show that the white majority votes sufficiently as a bloc to enable it to usually

(Continued on following page)

that uses bivariate ecological regression analysis[29] to prove a violation of Section 2(b). Only after the plaintiff meets this burden of proof does the Court look at the totality of the circumstances to confirm or deny the discrepancy.[30] While a defendant can try to point out some selected surrounding circumstances[31] to defend against a

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(Continued from previous page)

defeat the minority's preferred candidate (a proof that uses statistical analysis of racially polarized voting, *id.*). The proof of racially polarized voting itself is purely statistical: "[T]he legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates . . . " 478 U.S. at 62.

[29] Bivariate ecological regression analysis, a fancy term meaning a simple type of statistical test using only two variables, was the mechanism approved by the plurality opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to demonstrate that a contested voting mechanism or procedure "results" in a violation of Section 2.

[30] This Court, in *Thornburg*, noted that the totality of the circumstances test (the test from *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)) was not needed at all to prove a violation under Section 2(b). 478 U.S. at 44 n.8. As Justice O'Connor noted in her concurring opinion, "As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the '*Zimmer* factors' . . . " 478 U.S. at 92.

[31] Not all circumstances may be relevant. For example, this Court in *Thornburg* noted that bloc voting is not disproved by the success of minority preferred candidates "in one or a few individual elections." 478 U.S. at 57. Likewise, the following factors cannot be used by defendants to rebut a violation: (a) proof that factors "other than race were the principal cause of voters' choices", 478 U.S. at 61, n.31; (b) "reasons why black and white voters vote differently", 478 U.S. at 63; (c) the fact that the minority group may be "predominately poor, uneducated, and unhealthy". 478 U.S. at 67.

vote dilution claim,[32] the totality of the circumstances test is not a method of proving the claim.

The effects test of Section 5 *is* the totality of the circumstances test. In other words, Section 5 does not look to statistics to find a violation but rather to the entire situation surrounding the electoral process. The distinction between the effects and the results test was stated succinctly by this Court in *Thornburg*:

> The [Senate] Report notes that in pre-Bolden cases such as White v. Regester and Zimmer v. McKeithen, plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure *had the effect* of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 44 n.8 (1986) (citations omitted) (emphasis supplied). Thus, the effects test and the totality of the circumstances test are one and the same, and the "totality of the circumstances" is the touchstone of liability under Section 5, unlike the results test of Section 2(b), where liability is grounded in statistics and an evaluation of some of the circumstances becomes a defense.

CONCLUSION

This Court has always recognized the importance of an independent judiciary: "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler*

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[32] This is the precise result of *Thornburg*, for the original finding that House District 23 violated Section 2(b) was reversed because this Court found that the lower court had ignored the significance of the "*sustained* success black voters" experienced in that district. 478 U.S. at 77 (emphasis in original).

v. Judicial Council, 398 U.S. 74, 84 (1970). Dissenting in the same case, Justice Douglas stated, "An independent judiciary is one of this nation's outstanding characteristics." *Id.* at 136 (Douglas, J. dissenting).

Making judges "representatives" would do violence to (and perhaps destroy) the American concept of an independent judiciary. It is inconceivable that Congress would have intended to adopt a system of "representative" judges without extensive debate concerning the resulting severe erosion of the judiciary's independence in the interpretation, consideration, and application of the law. As this Court said in *Withrow v. Larkin*, 421 U.S. 35 (1975), "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " 421 U.S. at 47 (citations omitted). The concept of judges "representing" a designated constituency or a discrete category of people rather than being selected to do justice without fear of retribution from a narrow electorate is anathema to the magnificent American tradition of an independent judiciary.

Both the *en banc* decision in *LULAC* and the opinion, decision, and judgment of the district court in this proceeding should be affirmed.

All of the above and foregoing is thus respectfully submitted.

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Nos. 90-757 and 90-1032

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

UNITED STATES OF AMERICAN,

Petitioner,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The wisdom of Louisiana's decision to select the members of its Supreme Court by popular election is not subject to review by this Court. What *is* subject to federal judicial oversight is the process by which that election occurs. The sole question presented by this case is whether section 2 permits African-American voters to

challenge judicial election systems that deny them an equal opportunity to participate in the process of choosing judges, even when that denial is not the consequence of purposeful discrimination.

I. CONGRESS HAS DECISIVELY REJECTED RESPONDENTS' DISTINCTION BETWEEN PURPOSEFUL AND NONPURPOSEFUL DISCRIMINATION

As this Court recognized in *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986), the 1982 amendment to section 2 "[f]irst and foremost . . . dispositively rejects the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." Respondents' argument to the contrary--that under subsection 2(a), the intent requirement "remains unchanged," Brief for Respondents at 17--goes beyond even the bounds of overzealous advocacy. The so-called "results" test is expressly contained in subsection 2(a), as amended in

1982.[1] The placement of the "results" language in subsection 2(a) also undermines completely another suggestion advanced by the court of appeals and respondents: that section 2 can be disaggregated into two separate tests, one of which governs judicial elections and the other of which does not. *See LULAC v. Clements*, 914 F.2d at 625 & 628-29; Brief for Respondents at 17-19. The language of section 2 provides no warrant for holding a particular practice vulnerable to attack if it is purposefully discriminatory but immune from attack if it is not. Both the court below and respondents concede, as they must, that section 2 bars Louisiana from adopting or maintaining a judicial election system for the purpose of diluting the voting strength of Orleans Parish's African-American citizen. *See LULAC v. Clements*, 914 F.2d 620, 625 & n. 6 (5th Cir. 1990) (en banc); Brief for Respondents at 1, n.1, and 16. Given that concession and the structure of section 2, they have absolutely no basis for

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[1]Indeed, the word "results" does not even *appear* in subsection 2(b), where respondent suggests it is located. Brief for Respondent at 17.

claiming that the results test is not similarly broad in its coverage.

II. THE LANGUAGE AND STRUCTURE OF THE VOTING RIGHTS ACT, TAKEN AS A WHOLE, COMPEL THE CONCLUSION THAT SECTION 2 COVERS JUDICIAL ELECTIONS

The language of section 2 is unconditional in its prohibition of practices that result in a denial or abridgement of minority voting rights:

> "*No* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by *any* State . . . in a manner which results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color . . . ."

42 U.S.C. § 1973(a) (emphasis added). When a statute contains such unambiguous language, courts construing the statute's reach must not contract its scope. *See West Virginia University Hospitals v. Casey,* 59 U.S.L.W. 4180, 4184 (1991) (No. 89-994). Had Congress meant to confine section 2's reach to certain elective offices only, it certainly knew how to do so. Section 11(c) of the Act, for example, is limited to elections held solely or in part to fill seven

expressly enumerated positions. 42 U.S.C. § 1973i(c). Section 2, by contrast, contains no such exclusion.

III. SECTION 2'S USE OF THE WORD "REPRESENTATIVES" DOES NOT EXCLUDE JUDICIAL ELECTIONS

The linchpin of respondents' argument lies in their claim that Congress used the word "representatives" intentionally to exempt judicial elections from scrutiny under section 2. That argument fails for two independent reasons: first, the word "representatives" can permissibly be read to include elected state-court judges; second, there is no evidence, either in the statute itself or in the legislative history that Congress chose the word "representatives" to restrict section 2's scope.

A. *Elected State-Court Judges Can Reasonably Be Viewed as "Representatives"*

Contrary to the assertion made by the court below and respondents, *see, e.g., LULAC*, 914 F.2d at 628; Brief for Respondents at 23-29, the word "representatives" does

not unambiguously exclude elected state-court judges.

That the word "representative" is not equivalent to the term "servant of a constituency" is clear. Jurors, as we have already pointed out, are "representatives" of the community, even though they are sworn to be impartial. *See* Brief for Petitioners at 56-62.

Moreover, this Court has recognized that state-court judges perform a central function in representative government. In *Sugarman v. Dougall*, 413 U.S. 634 (1973), Justice Blackmun, writing for eight members of the Court, recognized that "persons holding state elective or important nonelective executive, legislative, *and judicial* positions . . . perform functions that go to the heart of *representative* government." *Id.* at 647 (emphasis added).[2] Thus, this Court should construe the word "representatives" in subsection 2(b) to refer to officials who exercise a function central to the administration of a

[2]Although then-Justice Rehnquist dissented from the Court's holding in *Sugarman*--that a New York statute barring nonresident aliens from civil services jobs was unconstitutional--he, too, recognized that "policy-making for a political community" involved, among other people, "*judges*," *Sugarman*, 413 U.S. at 661 (emphasis added).

representative form of government.

Finally, the states themselves have acknowledged that the function state-court judges perform is in many relevant respects identical to the functions performed by officials in the other branches of government. A particularly salient example is presented by the position taken by the state of Missouri (with the support of 15 other states as *amici curiae*) in *Gregory v. Ashcroft*, No. 90-50. In that case, Missouri has argued that its judges, who are subject to retention elections, are policy-making officials within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. § 630(f): "Judicial decision making . . . is an expression of public policy, no less, and perhaps more, compelling than the modes of expression available to the legislative and executive branches of government." Brief for Respondent at 19, *Gregory v. Ashcroft*, No. 90-50;[3] *see*

[3]Ironically, in *Houston Lawyers' Ass'n v. Attorney General of Texas*, Missouri and many of the same states that supported its claims that judges were clearly elected officials and state policy-makers, take the position as amici supporting the state of Texas that judges are *not* "really" elected, or are not "really" policy-making officials. It is hard to know what sense to make of this abrupt about-face, but it certainly casts substantial doubt on the importance of the states' interests in

also, e.g., Transcript of Oral Argument at 30 ("The list of decisions from [Missouri] courts that have outlined and defined the common law and set the policy for the State of Missouri is endless"); *id.* at 38 (explaining that the judges involved are also "elected officials" within the meaning of the ADEA because they "do answer to the voters").[4] In light of the day-to-day functions performed by state-court judges, respondents' reliance in this case on statements by various courts and commentators regarding the nonrepresentative role played by *federal* courts, *see, e.g.*, Brief for Respondents at 25 & 32 (quoting *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 60 (1982), *Mistretta v. United States*, 488 U.S. 361, 407 (1989), the late Alexander Bickel, and Robert Bork), is sadly off

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retaining at-large election systems for judges when such systems would be subject to attack if they involved any other office when the states cannot even agree whether judges are in fact different from other officials. Quite frankly, it suggests the states' purported interests are rather tenuous or pretextual.

[4]Every court to have addressed the question has held that judges who initially obtain office through popular elected are exempted from the ADEA because they are "persons elected to public office," 29 U.S.C. § 630(f), a phrase whose language tracks in pertinent part the language of section 14(c)(1) of the Voting Rights Act.

the mark.

B. *Congress' Use of the Word "Representatives" Was Not Intended to Exempt Judicial Elections from Section 2*

Petitioners recognize, of course, that although the word "representatives" clearly *can* include judges, there are circumstances under which it might be used in a more restrictive fashion. For example, large parts of Title 2 of the United States Code use the word "Representatives" to refer solely to members of the lower house of the United States Congress or in contrast to "Senators." No one, however, contends that Congress used the word "representatives" in section 2 to restrict its scope to members of the United States House of Representatives, or even to members of the lower house of bicameral legislative bodies. Everyone agrees that county commissioners and school board members are covered by section 2. Indeed, Congress' use of the word "representatives" rather than the word used by this Court in *White v. Regester*, 412 U.S. 755 (1973)--"legislators"--

shows that Congress intended for section 2 to reach *more* than simply elections for members of the legislative branch of state governments.

Congress' express intention, therefore, was to cover elections beyond those for legislators. The interchangeable words used by Congress, in the statute and in the legislative history, to refer to the positions within the purview of section 2--"representatives," "candidates," "elected officials," "officeholders," and the like, *see* Brief for Petitioners at 41-42; Brief for the United States at 27-30--provide no basis for distinguishing those non-legislative offices that are primarily executive in nature and those that are predominantly judicial. Section 2's language tracks precisely the terminology used in the definitional provision of the Act--section 14(c)(1)--which, as we explained in our opening brief, unambiguously includes judges. Section 14(c)(1) extends the Act's reach to elections for all "*candidates* for public . . . *office*." 42 U.S.C. § 1973*l*(c)(1) (emphasis added). Similarly, section 2 provides, in delineating the results test, that "[t]he extent

to which members of a protected class have been elected to *office*" is one circumstance to be considered in deciding whether the plaintiffs' voting rights have been violated. 42 U.S.C. § 1973(b) (emphasis added). It would have made no sense for Congress to have viewed the extent to which minority group members have been elected to judicial office as a relevant circumstance[5] in assessing a section 2 claim if such elections were not covered by the statute. Moreover, the immediate juxtaposition of the words "representatives" and "office" shows how Congress used these terms interchangeably to refer to *all* officials holding elective positions.

Given the categorical language used both in section 2 and in section 14(c)(1), this Court should be especially reluctant to imbue the word "representatives" with a restrictive meaning in the complete and utter absence of

---

[5]That Congress saw minority electoral success in judicial elections as a significant indicator is shown by its repeated references to the number of elected African-American and Hispanic jurists in the legislative history of the 1970, 1975, and 1982 amendments and extensions of the Voting Rights Act. *See* Brief for Petitioners at 37-39; Brief for the United States at 31.

any explicit or implicit indication of a congressional purpose to adopt such a meaning. That various policy concerns might have led Congress to have exempted judicial elections from coverage under section 2 "had it thought about it," *West Virginia University Hospital*, 59 U.S.L.W. at 4184, cannot justify this Court's judicial construction of such an exemption through a tortured reading of the statutory language.

C. *Congress' Expressed Intentions Are Fully Consistent with Including Judicial Elections Within the Scope of Section 2*

The central goal of the Voting Rights Act and its extensions and amendments has been "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally." S. Rep. No. 97-417, p. 5 (1982) [hereafter cited as "Senate Report"].[6] Any comprehensive and final resolution of the problem of race discrimination in voting

[6]This Court has recognized the "authoritative" nature of the 1982 Senate Report in discerning Congress' intent. *Thornburg v. Gingles*, 478 U.S. 30, 43 n. 7 (1986).

must reach race discrimination in the mechanisms used to elect judges for, as this Court reiterated a fortnight ago, "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." *Powers v. Ohio*, 59 U.S.L.W. 4268, 4272 (1991) (No. 89-5011).

As *Powers* recognized, the two "most significant opportunit[ies] to participate in the democratic process" enjoyed by most citizens are voting and jury service. *Id.* at 4270. But just as racial discrimination in the selection of jurors "offends the dignity of persons and the integrity of the courts," *id.* at 4269, so, too, with racial discrimination in the election of judges. To permit states to use systems for electing judges that deny African-Americans an effective voice tells African-American citizens that their views regarding who should sit in judgment over the entire community are not worthy of the respect accorded the views of white voters, thereby denying African-Americans equal dignity. Moreover, it cannot help but breed cynicism

regarding the fairness of the judicial system as a whole to have a bench so overtly unrepresentative of the community whose power it exercises.

Nothing in the language or legislative history of the Voting Rights Act supports excluding judicial elections from coverage under section 2. In light of the unconditional ban on discriminatory voting mechanisms, the inclusionary language, and the clear congressional purpose to abolish *all* racial discrimination in voting, the most logical and defensible reading of section 2 would reach the kind of discrimination alleged in this case.

IV. RESPONDENTS FUNDAMENTALLY MISCONSTRUE THE FIRST PRONG OF THORNBURG V. GINGLES

In *Thornburg v. Gingles*, 478 U.S. at 48 (emphasis added), this Court identified three circumstances which "*generally*" must be shown to prove a claim of "vote dilution through submergence."[7] The first of these factors

[7]Nothing in the *Gingles* opinion suggests that these three factors must be established to prove *every* claim under section 2's "results" test. For example, even in a community where there is no racial bloc voting, the use of registration practices that disproportionately prevent African-Americans from voting and thus participating in the political process is subject to challenge under section 2. Similarly, even in a community where African-Americans could not form a majority in a single-member district, the use of an anti-single-shot rule, *see, e.g., City of Rome v. United States*, 446 U.S. 156, 184 (1980) (explaining single-shot voting), might be subject to attack under section 2 if the interaction of that rule with racial bloc voting resulted in the defeat of African-American candidates who might otherwise win election.

is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, . . . the *multimember form* of the district cannot be responsible for minority voters' inability to elect its [*sic*] candidates." 478 U.S. at 50 (emphasis in original). Read in context, what the first prong of the *Gingles* test requires is that plaintiffs challenging a scheme as dilutive show a causal link between the election practice they challenge and their inability to elect the candidates of their choice.

Contrary to respondents' assertion, Brief for Respondents at 41, the test set out in the first prong of *Gingles* does not invariably require presentation of a hypothetical single-member district complying with principles of one-person, one vote. Rather, the first prong

of *Gingles* requires plaintiffs simply to show the existence of a constitutionally acceptable alternative to the existing scheme that would provide them with a more equal opportunity to participate and elect the candidates of their choice. This is a case-specific question "peculiarly dependent on the facts in each case," *Gingles,* 478 U.S. at 79 (internal quotation marks omitted); its contours depend on the precise aspects and consequences of the election structure challenged by plaintiffs in their complaint. In the case of petitioners' to the scheme for electing the Louisiana Supreme Court, such an alternative can be demonstrated by showing that African-American voters are sufficiently numerous and geographically compact to form a majority in a district equivalent in population to already existing Louisiana Supreme Court districts. Thus, petitioners showed that it would be possible to create a majority African-American supreme court district that would be more populous than two of the five existing single-member Supreme Court Districts. *See* Pet. App. at 10a. Respondents' suggestion that without the constraints

of one-person, one-vote, there is no judicially discernible and manageable standard for assessing claims of racial vote dilution, Brief for Respondents at 43, ignores this obvious method for assessing plaintiffs' ability to establish dilution through submergence.[8] Even if states are not obligated to develop *equipopulous districts as a remedy* for racial vote dilution in judicial elections, certainly a showing that an identifiable group of minority voters has less opportunity to elect the candidates of its choice than a similarly numerous group of white voters should satisfy the first prong of *Gingles*. *See* Brief for the United States as Amicus Curiae Supporting Reversal in *Houston Lawyers' Ass'n v. Attorney General of Texas* at 18 ("Group vote dilution occurs when the practical operation of an electoral system effectively erases or minimizes the voting strength of a particular group, such as a racial minority."). As we discuss in the following section, the remedy issue does not define the violation, but should be addressed by the trial

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[8] *See infra* note 9.

court only after a finding of liability.

V. RESPONDENT'S BRIEF ADVANCES ARGUMENTS IRRELEVANT TO THE QUESTION PRESENTED IN THIS CASE

Respondents devote a substantial part of their argument to issues connected with developing a remedy for a violation of section 2. *See* Brief for Respondents at 34-39. Those concerns are irrelevant to the question before this Court: the scope of section 2's coverage.

First, Congress has clearly provided that a state's nondiscriminatory interests cannot trump the compelling constitutional aim of the Voting Rights Act: to eradicate racial discrimination in voting. *See* Senate Report at 29 n. 117 ("even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process"); *id.* at 195 (additional views of Sen. Robert Dole, sponsor and drafter of amended subsection 2(b)) (rejecting the suggestion that "defendants be permitted to rebut a showing of

discriminatory results by a showing of some nondiscriminatory purpose behind the challenged voting practice or structure").

That is not to say, of course, that a state's legitimate interests are wholly irrelevant to a section 2 case. But the proper occasion for accommodating those interests is in fashioning a *remedy*, not in determining *liability*. In its current posture, this case does not present the question whether any particular remedy is required. Should petitioners prevail on remand in proving that their voting rights are being diluted by the present election scheme, Louisiana will, in the first instance, have the opportunity to propose a new system that both remedies the denial of petitioners' voting rights and serves the state's legitimate interests. Such a remedy "necessarily depend[s] upon widely varied proof and local circumstances," and Congress has eschewed "prescribing in the statute mechanistic rules for formulating remedies . . . ." Senate Report at 31. Thus, remedial concerns cannot form the basis for a categorical exclusion of judicial elections from coverage

under section 2.

Second, the remedial concerns identified in respondents' brief are an utter makeweight in this case, further showing why such concerns cannot justify a categorical exclusion of judicial elections. For example, respondents identify as "[p]ossibly the most difficult" problems to solve those related to the creation of additional judgeships and population changes. Brief for Respondents at 37. But Louisiana has not added judgeships to its Supreme Court in this century. Nor has it changed the judicial election districts for the Supreme Court since at least 1921. Thus, neither of these "problems" has any bearing whatsoever on this case. Louisiana is entirely free to retain its seven-member Supreme Court. And the inapplicability of one-person, one-vote to judicial districts frees the state from the need to redraw its supreme court districts decennially.[9]

[9]As we have already explained, the feasibility of creating a majority African-American district whose population is equivalent to the so-called "ideal" district size may be relevant to establishing liability, for it is one way of satisfying the causal nexus test delineated in *Gingles*. But it is by no means required that the state's remedy, should liability be proven, comport with one-person, one-vote. The state remains free to accommodate other goals, so long as a complete remedy for the violation of section 2 has been provided.

The problem of actual or perceived bias if justices are elected from "much smaller" districts, Brief for Respondents at 38, is an equally flimsy concern. The division of the existing First Supreme Court District used by petitioners at trial to show how the current district submerged Orleans Parish's African-American majority in an overwhelmingly white multimember district would result, if it were adopted as a remedy, in the creation of two districts, each have a population of well over half a million persons, and each having over 100,000 more residents than one of the existing single-member Supreme Court Districts. *See* Pet. App. at 10a.

At their core, the assertions about impartiality advanced by respondents, *see, e.g.,* Brief for Respondents at 38 7 49-50, and by the Solicitor General at the tail end of his brief, *see* Brief for the United States at 35, are deeply racially insulting. They suggest implicitly that supreme court justices selected by African-American voters

will somehow be less impartial than justices selected by white voters. Permitting states to defend their existing judicial election systems by relying on such a pernicious stereotype is utterly unacceptable. *Cf. Powers v. Ohio,* 59 U.S.L.W. at 4271 (the equal protection clause forbids using race as a "proxy for determining juror bias or competence"); *Batson v. Kentucky,* 478 U.S. 79, 97 (1986) (prosecutors may not strike jurors based "on the assumption . . . or intuitive judgment . . . that they would be partial to the defendant because of their shared race").

The central premise of the Fourteenth and Fifteenth Amendments, as well as of the Voting Rights Act of 1965, especially as it was amended in 1982, is that African-American voters are as qualified as white voters to participate in the process of choosing public officials and that African-American jurists are are able as their white counterparts to fulfill their oath of office.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 90-757

RONALD CHISOM, ET AL., PETITIONERS

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Respondents concede that the original version of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (1982), applied to state judicial elections. Resp. Br. 1 n.1, 16. Respondents also concede that Section 2 of the current Act applies to elections for members of the legislative and executive branches. Resp. Br. 19. Respondents seem to concede (albeit reluctantly and only implicitly) that Section 5 applies to state judicial elections. Resp. Br. 38 n.24. Finally, re-

spondents concede that Section 2 of the current Act applies to judicial elections insofar as intentional discrimination is at issue. Resp. Br. 15, 19. At the same time, respondents maintain that Section 2 can nonetheless be parsed in a manner that exempts judicial elections from the results test. In this regard, respondents' submission hinges entirely on the argument that judges are not "representatives" for purposes of that law or as a general matter. As support for that argument, respondents principally rely on the Fifth Circuit's reasoning in *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F.2d 620 (1990) (en banc) (*LULAC*), cert. granted, Nos. 90-813 & 90-974 (Jan. 18, 1991).

We have already explained how the Fifth Circuit misinterpreted Section 2 both in this case and in *LULAC*. As we explained in our opening brief in this case and in our amicus brief in the *LULAC* case, the Section 2 results test applies to judicial elections, but the factors that set judges apart from other elected officials and that distinguish the judicial process from other aspects of government are matters that the courts can—and must—take into account under the "totality of circumstances" test of Section 2(b), 42 U.S.C. 1973(b). See 90-757 & 90-1032 U.S. Br. 17-36; 90-813 & 90-974 U.S. Br. 17-28. We make only the following additional points in reply: [1]

[1] Respondents expend considerable effort on the facts of the case, contending that the district court correctly found that the Louisiana system does not violate Section 2. Resp. Br. 1-12. Similarly, some amici argue that the explanation for the low number of minority judges lies not in racial discrimination, but in the combination of two facts: (a) States often require that a lawyer have been a member of the state bar for a certain number of years before he is eligible to become a judge, and (b) there is currently a relatively low percentage of minority attorneys who satisfy such requirements. See Georgia Amicus Br. 8-10 (Georgia requires bar membership for seven years to become a judge); Washington Legal Foundation (WLF) Amicus Br. 21-22 (Louisiana has a five-year bar membership requirement). See also Texas Br. 5 (Texas has a four-year bar membership requirement). The relevant question, however, is not whether the number of minority *judges* corresponds to the population of minority lawyers, but whether minority *voters* have an opportunity to elect candidates of their choice. In any event, even if respondent and amici have correctly identified the explanation for minority electoral success or failure, that issue is not before the Court at this time. The Fifth Circuit did not reach the merits of the Section 2 challenge in this case or in *LULAC*. The question raised by amici would be an appropriate matter for the court of appeals to resolve on remand if this Court holds that the Section 2 results test applies to judicial elections.

1. Respondents rely heavily on decisions by this Court and the lower federal courts concluding in certain other contexts that judges are not "representatives." Resp. Br. 23-29. In so doing, respondents mistakenly conclude that because judges are not "representatives" for some purposes, judges are not "representatives" for any purpose. In fact, those contexts have nothing to do with the proper definition of the term "representatives" in Section 2. Rather, as we have discussed, the scope of the term "representative" can vary depending on the legal question being considered, and it is clear that Congress used this term in Section 2 in its most general sense. 90-757 & 90-1032 U.S. Br. 20-32.

Respondents err in relying on decisions describing the proper role of the *federal* courts. Resp. Br. 25, citing *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Article III judges are

not elected. Whether or not they can be said in some sense to "represent" their district or circuit in the federal judiciary, their position is plainly not analogous to that of state judges who are elected from a particular area. Federal judges are given life tenure and salary protection precisely in order to insulate them from the viewpoints of the community. 90-757 & 90-1032 U.S. Br. 24 n.19. As Judge Higginbotham noted in *LULAC*, 914 F.2d at 636, one reason why States have voters select trial and appellate judges for fixed terms, rather than have governors (for example) appoint judges for life, is to ensure that the state bench remains responsive to the interests of the public by permitting the electorate periodically to turn out judges who fail in that respect. In that very practical sense, elected members of the state bench do represent the electorate, because such democratically accountable judges are directly authorized by the voting public to carry out the governmental function of adjudicating legal disputes.

Underlying respondents' argument is the mistaken assumption that Congress believed that a judge cannot be a "representative" and remain "independent." The two attributes, however, are not mutually exclusive, and the federal model is by no means the only way to establish an independent judiciary. At the same time, it does no disservice to elected state judiciaries to acknowledge that one reason why States limit the tenure of judges is to ensure that the bench remains directly accountable to the electorate.

2. Respondents invoke the canon of construction that federal statutes will not be interpreted to alter the federal-state balance unless Congress has clearly stated its intent to interfere in state prerogatives.

Respondents maintain that Congress did not legislate with sufficient clarity to subject state judicial elections to the Section 2 results test. Resp. Br. 32-34.[2] That canon, however, does not assist respondents. Congress passed the Voting Rights Act for the express purpose of regulating the States' electoral rules and process, see *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); this Court has stated that the Act should be read "broad[ly]" so that it can achieve its remedial purposes, *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969); and respondents concede both that the term "representatives" includes every elected member of state government *other* than judges and that Section 2 *does* apply to judicial elections insofar as intentional discrimination is involved. Under these circumstances, it is respondents that

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[2] One of the respondents in *LULAC* makes a similar argument based on the principle that a statute should be construed to avoid having it declared unconstitutional. Entz Br. 23-35. That claim lacks merit. That canon is "quite often useful in close cases, or when statutory language is ambiguous," but it is "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989), quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985). That canon comes into play only if there are "fair alternatives" to the supposedly unconstitutional interpretation, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953), or if a different construction of a law is "fairly possible," *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). See *City of Rome* v. *United States*, 446 U.S. 156, 172-173 (1980) (rejecting the suggestion that the Court should adopt a "saving construction" of Section 5, because "the statutory meaning and congressional intent are plain"). See also *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979); *Swain* v. *Pressley*, 430 U.S. 372, 377-378 & n.11 (1977).

have the burden of explaining why Congress carved out an exception for judges from the otherwise comprehensive scope of Section 2.

Respondents attempt to make subsection (a) into the "intent" subsection and subsection (b) into the "results" subsection. Resp. Br. 17-18. The text of Section 2 lends no support to respondents in this regard. Subsection (a) states that the Act is violated if a state law "*results* in a denial or abridgement of the right of any citizen * * * to vote on account of race or color * * * *as provided in subsection (b) of this section*," while subsection (b) identifies the "results" test (emphasis added). Thus, if the text of Section 2 is sufficiently broad to include elected judges, as we believe it to be, the text of that provision shows as well that the results test is applicable to judicial elections.

3. Respondents rely on the special role that courts have played throughout our history in the impartial adjudication of disputes and in the protection of individual rights against the other branches of government and the public. Resp. Br. 29-32. That unique function, respondents argue, strongly militates against treating judges in the same manner as other elected state officials for purposes of the Voting Rights Act.

We agree with the premise of respondents' argument and much of their reasoning, but we disagree with their conclusion, since, as we explained in our opening brief (at 34-35), that conclusion is not faithful to the text and purposes of Section 2. As we also explained, Section 2 requires the courts to consider the "totality of circumstances" when analyzing a Section 2 claim, and one of the "circumstances" that must be considered is whether the challenged state electoral

procedure "is rooted in a strong state policy divorced from the maintenance of racial discrimination." *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976). See 90-813 & 90-974 U.S. Br. 17-24.[3] The Act therefore accommodates the concerns discussed by respondents as well as the ones that prompted Congress to revise the Act in 1982.

4. Respondents note that the "one person, one vote" rule does not apply to the election of judges, *e.g.*, *Wells* v. *Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), so a State is free to draw judicial districts without regard to their relative populations. It is therefore, respondents point out, *always* possible to find or construct a judicial district in which minorities form the majority of the registered voters, even if the district is quite small. Applying vote dilution principles to judicial elections, according to respondents, will inevitably lead to a guarantee of proportional representation and safe seats for minority-favored candidates, which Section 2 in terms

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[3] Amicus WLF maintains that "the nature of the office holder's function appears nowhere in the statute or the legislative history as a circumstance to be considered." WLF Amicus Br. 20. The text of Section 2, however, refers expressly to the "totality of circumstances," and the Senate Report on the Act relied explicitly on a list of 23 decisions, principally from the Fifth Circuit, that had applied the vote dilution standard adopted by the Fifth Circuit in *Zimmer* v. *McKeithen* and applied by this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973). See S. Rep. No. 417, 97th Cong., 2d Sess. 23, 31-32, 33 (1982). See generally 90-757 & 90-1032 U.S. Br. 29.

disavows. The only way to escape that syllogism, respondents submit, is to exclude judges from the ambit of the term "representative." Resp. Br. 40-45.

Respondents' argument misses the mark in the setting of this case, because Louisiana has decided to elect supreme court justices on a district-by-district basis, rather than on an at-large basis. Having made the judgment that a district-by-district system of electing supreme court justices best implements state electoral policy, Louisiana is hardly in a position to contend that drawing judicial district lines in a different manner in the one geographic location that is a multimember district is alien to its electoral process. For that reason, we argued in our opening brief (at 35-36) that, unlike Texas, Louisiana cannot invoke the policy justifications offered in defense of at-large judicial elections. Whatever merit respondents' argument may have in other contexts, it has considerably less force in this one.

The problem identified by respondents, however, does arise in connection with the at-large election of judges. It perhaps would be acute when a geographically compact and politically cohesive minority population is very low (*e.g.*, 5%) and the current number of sitting judges cannot be proportionally divided into districts in a way that reflects the potential voting strength of that minority population (*e.g.*, there are only 5 judges). In such a case, it may be infeasible to draw a district of any reasonable size that has a majority of eligible minority voters. Our interpretation of the Voting Rights Act, however, allows the courts to treat that factor under the "totality of circumstances." It also permits a State to show that it has a strong interest in having judicial districts that are sufficiently large as to avoid

the fact or appearance of bias—" 'home-town' justice," Resp. Br. 38—in its judicial system. The State has a legitimate interest in such matters, and they are ones that may be considered under Section 2.

5. Respondents and the State of Georgia contend that unique remedial problems arise if judges are deemed to be representatives. For example, States often increase the number of trial judges in order to keep pace with the increasing number of cases that must be handled within a district, even when the population remains the same. Treating judges as "representatives," the argument goes, will require each State to undergo the quite burdensome process of redrawing the lines of its judicial districts every time that the State authorizes new judgeships in order to lighten the burgeoning caseload of trial and appellate courts. Resp. Br. 36-39; Georgia Amicus Br. 14-16. That argument mistakenly assumes that adding new judgeships at-large or allocating them in a fair manner (such as randomly, or in some sequence) would necessarily violate Section 2, which we would dispute. That argument also mistakenly assumes that the only permissible remedy for a Section 2 violation in connection with judicial elections is the use of single-member districts. As we have argued, Section 2 requires the courts to consider the unique attributes of the judicial office in determining whether a State has violated Section 2. The same rationale would require courts to consider such factors in deciding what remedy is necessary to cure a Section 2 violation.[4]

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[4] Respondents' argument also proves too much. Because Section 5 applies to judicial elections, the creation of addi-

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

APRIL 1991

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tional judgeships is subject to preclearance. See *Martin* v. *Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), and *Georgia State Bd of Elections* v. *Brooks*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court) (both holding that Section 5 applies to the creation of new judgeships). See also *City of Lockhart* v. *United States*, 460 U.S. 125 (1983) (the change from a three-member to a five-member city council is a change requiring preclearance). Respondents do not explain why application of Section 2 to judicial elections imposes burdens that are more onerous than the ones that result from application of Section 5.

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NO. 90-757

In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, et al.,
Petitioners,

VERSUS

CHARLES E. ROEMER, et al.,
Respondents,

CERTIORARI TO THE UNITED STATES
COURT OF APPEAL FOR THE FIFTH CIRCUIT

**ORIGINAL BRIEF SUBMITTED ON
BEHALF OF AMICUS CURIAE,
SUPREME COURT JUSTICE FOR ORLEANS, INC.
SUPPORTING REVERSAL**

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MOTION FOR LEAVE
TO FILE BRIEF AS AMICUS CURIAE

NOW INTO COURT, through undersigned counsel, comes SUPREME COURT JUSTICE FOR ORLEANS PARISH, INC., amicus curiae, who respectfully moves this Honorable Court for leave to file the present brief. The said brief, filed in support of petitioners, RONALD CHISOM, ET AL, requests a reversal of the decision rendered in this cause by the United States Court of Appeal for the Fifth Circuit.

Counsel for amicus curiae, a member of the bar of this Court, respectfully certifies that counsel for all parties heve granted their consent for amicus curiae to present and file the present brief.

DALREEN M. JACOBS

QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, as amended, govern the the election of judicial officers?

PARTIES

The following parties were in the the courts below:

Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon, III and the Louisiana Voter Registration/Education Crusade, Plaintiffs;

The United States of America, Plaintiff-Intevenor;

Charles E. Roemer, in his capacity as governor of the State of Louisiana, W. Fox McKeithen, in his capacity as Secretary of the State of Louisiana, and Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana, Defendants.

Pascal F. Calogero, Jr., and Walter F. Marcus, Jr., Defendants-Intervenors.

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NO. 90-757

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD CHISOM, et al.,
Petitioners,

VERSUS

CHARLES E. ROEMER, et al.,
Respondents,

STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae, Darleen M. Jacobs, requests leave to appear at oral arguments.

STATEMENT REGARDING JURISDICTION

Amicus curiae respectfully adopts the jurisdiction contained in the original brief of the plaintiffs-appellants, Ronald Chisom, et al. Amicus further submits that jurisdiction in uncontested.

STATEMENT REGARDING AMICUS CURIAE

Amicus curiae herein is a New Orleans non-profit organization interested in promoting the election of a Supreme Court Justice for New Orleans.

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. Section 1973, which provides pertinent part:

> "(A) No voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or implied by a state of a political subdivision in the manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color; (B) A violation of subsection (A) at this section is established if, based on the totality of the circumstances, it is

> shown that the political process leading to the nomination or election in the state of political subdivision are not equally open to participation by members of the class citizens protected by subsection (A) of this section in that its members have less opportunity to participate in the process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

STATEMENT OF THE FACTS

The Louisiana Supreme Court is comprised of seven justices, five of which are elected from single-member districts. The two remaining

justices, who terms are staggered, are elected from a multi-member district made up of Orleans, Jefferson, St. Bernard and Plaquemines Parishes. This is known as the First Supreme Court District (hereinafter referred to as the "First District"). Only voters who reside in the First District elect the justices from this district. The candidate who receives the majority of the votes sits on the Supreme Court.

The First District is Louisiana's most populous election district and it contains the most black voters of all of the six Supreme Court Districts. The First District has a majority white population and registered voter majority. Orleans Parish has a black majority in regards

to both total population and registered voter population. Blacks constitute 53% of the registered voters in Orleans Parish, but only 32% of the registered voters in the First District. Race continues to play an important role in judicial elections in Louisiana and the First District. Highly qualified black judicial candidates are unable to successfully seek election for a contested position in Jefferson, St. Bernard and Plaquemines Parishes because the white electorate will not vote for black candidates. Even though blacks do elect their preferred candidates in Orleans Parish-only elections, blacks represent only a minority of elected officials.

Amicus submits that the plaintiffs were successful in establishing the existence of the three elements enumerated by this court in Thornburg vs. Gingles, 478 U.S. 30 (1986). Blacks residing in Orleans Parish make up a group that is sufficiently large and geographically compact to constitute a majority in a single-member district. An Orleans Parish-only district would still be larger than the population size of the Fourth Supreme Court District. A district comprised of Jefferson, St. Bernard and Plaquemines Parishes would be almost equal in size. A new configuration represented by two single-member districts under the aforementioned plan would put to rest the denial and abridgement of the

right to vote of the affected black citizens, who are the voting majority in Orleans Parish. Since black candidates receive a majority of voter support from the black electorate, blacks will have the opportunity to elect their preferred candidate under a revised plan.

The plaintiffs also demonstrate that the white majority vote in the First District acts as a block to defeat the black population's preferred candidate. It was established at trial that the black candidate is the candidate of choice among black voters when black candidates oppose white candidates. White voters on the other hand, do not support black candidate. In the First District no black candidate has ever

been elected in a contested election to parish-wide office in Jefferson, St. Bernard and Plaquemines Parishes. The uncontested testimony at trial clearly shows that white voters will not vote for black judicial candidates. Only within Orleans Parish can a black win election, only because there are sufficient numbers of black voters to overcome white bloc voting.

Factors addressed by the Senate Report for the amendment to Section 2 of the Voting Rights Act are present in this case:

1) Louisiana has a past history of official discrimination cases, which is present today.

2) Racial polorization in the First District voting was clearly established at trial.

3) The opportunity for discrimination against blacks is enhanced because the majority of voting population is white, coupled with a majority vote requirement and staggered terms, effectively eliminates black judicial candidates from seeking elections to the Louisiana Supreme Court.

4) For blacks who live in Louisiana, the disparities in the educational, employment and living conditions effect their ability to participate in the political process.

5) Race plays an important role in the First District judicial elections; white voters will not vote for black candidates.

6) Blacks have enjoyed no success in seeking election for judicial offices in Jefferson, St. Bernard and Plaquemines Parishes. Since the combation white electorate in these parishes constitute a white majority, a black judicial candidate can not expect success in a four-parish election.

The District Court's finding, affirmed by the Fifth Circuit Court of Appeal, concluding that an Orleans-only Supreme Court District was not acceptable and that plaintiffs failed to satisfy all of the Gingles elements is incorrect.

STATEMENT OF THE CASE

COURSE OF PRIOR PROCEEDINGS

Amicus Curiae respectfully adopts the Statement of the Case and descriptions of the prior proceedings contained in the original brief of the plaintiffs-appellants, Ronald Chisom, et al.

ARGUMENT

The Election of Justices for the First District and Its Discrimatory Effect

This case presents an important issue of the meaning of the Voting Rights Act.

Amicus curiae respectfully submits this brief for the sole purpose of suggesting to this Court that the extreme importance of this case effects the makeup of the Louisiana Supreme Court and warrants this appeal. This is a voter discrimination case, brought pursuant to the Voting Rights Act (42 U.S.C. 1973), and the Civil Rights Act (42 U.S.C. 1983), to secure the rights guaranteed by the Fourteenth and Fifteenth Amendments of the United States Constitution. At present, the

multi-parish multi-member district in the First District are unable to elect the candidate of their choice to serve on the Louisiana Supreme Court. The ramifications of this case are such as to impact greatly on the exercise of important voting rights.

This case arises out of a challenge by the plaintiffs, who are voters, attorneys, and voter registration and election organizations, to the multi-member aspect of the scheme by which Louisiana Supreme Court Justices are elected. Plaintiffs contend, and amicus agrees, that the multi-member scheme denies black registered voters an equal opportunity to participate in the political process as it relates to the election of the Supreme Court

Justices because the one, in this instance, of the multi-member scheme dilutes minority voting strength. Louisiana consists of six districts from which members of the Supreme Court are elected. All of these districts, with the exception of the district which is comprised of Orleans, Jefferson, Plaquemines, and St. Bernard Parishes, are designed as to elect a single Supreme Court Justice. The First District elects two Justices, whose terms are staggered. It is the largest Supreme Court District which spans Orleans, Jefferson, Plaquemines and St. Bernard Parishes; and it has the largest black population. More than eighty (80%) percent of the black First District registered voters reside within

Orleans Parish. However, a substantial white majority results in the First District because the four parishes are meshed into one district, from which the entire population elects the two Supreme Court Justices. Amicus suggests that the First District could be split into two Supreme Court Districts, which would be made up of one district covering Orleans Parish and other district comprising of Jefferson, Plaquemines and St. Bernard Parishes.

No black had the opportunity to be elected to the Louisiana Supreme Court from any Supreme Court District in Louisiana in modern times. One Black was appointed to a vacancy on the Court for a period of less than three (3) weeks. But he was not

permitted under the Louisiana Constitution to seek election for which he had be appointed.

Racial Polorization and Its Effect on First District Elections

Historically speaking, Louisiana's judicial elections are racially polarized. Under the composition of the First District, it is not possible for a black to successfully seek a seat on the Supreme Court. The four parish scheme simply creates a white majority who overwhelmingly support white candidates in judicial elections.

The Gingles Factors

Amicus submits that all the elements enunciated by this court in the case of Thornburg vs. Gingles, 478

U.S. 30 (1986) are present. These factors are set out below:

1) The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district.

2) The minority group must be able to show that it is politically cohesive . . .

3) The minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence special circumstances such as a minority candidate running unopposed, . . . usually to defeat the minority's preferred candidate.

In the present case the black minority group is sufficiently large and geographically compact to constitute a majority in a single member district. Blacks comprise more than 50% of the population in Orleans Parish. Within this multi-member

First District, there are concentrations of black citizens that are sufficiently large and contiguous to compromise a voting majority in a single-member district lying wholly within the boundary of the multi-member First District; the present scheme results in a dilution of black votes because the black population is submerged in a white majority.

At trial the facts proved conclusively that the First District black population is politically cohesive. The statistical evidence presented, as well as the testimony of black candidates who stated that they received the majority of electorial support from black voters bore this fact out. Amicus submits that black

support for black candidates in Orleans Parish averages 80%; in Jefferson Parish black support for black candidates averages 90%. A high percentage of black voters regularly support black candidates. The blacks voter in Orleans Parish is is an excellent example of a politically cohesive group.

The black minority group demonstrated that the white majority votes sufficiently as a bloc results to defeat of the minority's preferred candidate. At trial, it was established that the black candidate was the candidate of choice by the black voters when a black candidate opposed the white candidate in any race. White voters, however, always fail to cast a majority of their votes

for any black candidate who opposes a white candidate.

It was clear at trial that white voters will not vote for black judicial candidates, regardless of their qualifications. It was found that only within Orleans Parish where black voters represent the voting majority are the black voters able to overcome the white bloc to elect a candidate of their choice. While blacks serve as judges in Orleans Parish, no black candidate has been elected in a contested election to a parish-wide office in Jefferson, St. Bernard or Plaquemines Parishes. It is impossible for a black candidate in the First District to successfully seek election to the Louisiana Supreme Court.

The History of Past Discrimination in Louisiana

Louisiana has a long history of official discrimination bearing upon the right to vote. This circumstance was acknowledged by the trial court. This history of discrimination has been the subject of continual litigation. The evidence at trial clearly displayed that this illegal voting discrimination in Louisiana goes on, even at present. Major vs. Treen, 574 F. Supp. 325 (E.D. La. 1983); East Jefferson Collision for Leadership and Development vs. Jefferson Parish, 691 F. Supp. 991 (E.D. La. 1988); and Citizens for a Better Gretna vs. City of Gretna, 834 F. 2d 496, 499 (5th Cir. 1987), cert. den. 106 L. Ed 2d 564 (1989). The

history against blacks in Louisiana is further evidenced by the fact that black students were not permitted to attend law schools in Louisiana until recent years a very large percentage of the State's black law student population attends the law school at Southern University, whereas most ofthe white public law students attend Louisiana State University, an academically superior institution. In regards to this point, the lower court had concluded that "the relatively lower economic status of black residents further affects accessibility to better education and such praticalities as campaign funding". As compared with whites, one-half fewer black persons in the First District have a high school education

and these blacks have one-half the per capita income of white. Additionally, there are five times as many black families living below the poverty level. The disparity is evident. The court in United States vs. State of Louisiana, 692 F. Supp. 642 (E.D. La. 1988) found that Louisiana higher public education still operates as a dual system.

Section Two of the Voting Rights Act Includes Judicial Elections

Nothing in the Voting Rights Act indicates that Congress intended to exclude the judiciary from the word "representatives" in Section Two of the Act. It is clear that the use of a multi-member electorate structure operates to minimize blacks preferred

candidates. In Louisiana, blacks do not have full access to the political process as it relates to the election of judicial candidates in the First District. At present, black voters in the First District have the opportunity to choose only among candidates offered by the white community. It is clear that the Voting Rights Act contemplates providing the black population with an equal opportunity to vote for judicial candidates of their choice. The defendants presented no evidence at trial that races where white candidates opposed each other offered black voters a choice of a "viable minority candidate".

In the present case, the use of larger multi-member First District is the direct cause of the dilution of black voting strength. Amicus submits that if the First District is divided into two smaller districts, blacks will have the ability to elect a black candidate. This scenario is simply not possible under the present system because blacks do not have the potential to elect their candidates within the present larger predominately white district.

The Decision of the Fifth Circuit Conflicts with the Sixth Circuit's Decision in Mallory vs. Eyrich

The Mallory vs. Eyrich, 839 F. 2d 275 (6th Cir. 1988) case involved the challenge of the election of the Ohio Municipal Court Judges. Here

the Sixth Circuit concluded that the Section 2 applied to the election of Judges.

The Mallory court scrutinized the language of the original Section Two of the Voting Rights Act in relation to the word "representatives" and found that no exceptions were expressed or implied. The Voting Rights Act of 1965 included a blanket prohibition against race-based discrimination in voting. The act defined "vote" or "voting" as including "all actions necessary to make a vote effective in any primary, special or general election, ... with respect to candidates for public or a party office ...". Congress did not change Section 14 (B) or the operative

provisions of this statute that define the scope of the Voting Rights Act when the language was added. Additionally, the court concluded that the 1965 act defined the term "vote" and "voting" very broadly and that judicial candidates are "unquestionably candidates for public . . . office".

In its decision, the Mallory court rejected the reasoning relied upon by the Fifth Circuit. In two respects, Mallory concluded that there is "no basis in the language or Legislative history of the 1982 amendment to support the holding" that when it used the word "representative" in the 1982 amendment, Congress removed Judicial Elections from the protective measures of the Act. There

is no reason to conclude that Congress intentionally created such an exception. The Mallory opinion makes it clear that the 1982 amendment to the Voting Rights Act did not "diminish the reach or effect of the original Section Two in any way". Amicus agrees that the word "representatives" should not be restrictivly interpreted and that the lower courts were in error for doing so. If it was seeking to limit the application of the Voting Rights Act to legislative races, Congress could have chosen the word "legislators", instead of "representatives". At present, there is absolutely no evidence that Congress intended to remove judicial elections from the

protection of the Voting Rights Act as it appears that the Act applies to all voting without any limitation.

CONCLUSION

The districting scheme presently in place in the First Distirct has the effect of unconstitutionally diluting the black vote in the parishes of Orleans, Jefferson, St. Bernard and Plaquemines. It is clear that voting in the First District is racially polorized, which effectively precludes a black candidate for the Louisiana Supreme Court to successfully seek a position as justice on the High Court. Amicus asserts that plaintiffs were overwhelmingly successful in showing existence of the Gingles factors, and as such that the current

districting arrangement is discriminatory within the provisions of Section Two of the Voting Rights Act. As a group, white voters simply will not vote for black judicial candidates in the First Supreme Court District. For the foregoing reasons, the decision of the Fifth Circuit should be reversed and the case should be remanded for a decision on the merits of the petitioners claims under Section Two of the Voting Rights Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of February 1991 served a copy of the foregoing on the counsel of record via the United States Postal Service, properly addressed, and postage prepaid.

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Nos. 90-757, 90-1032, 90-813, & 90-974

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Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,
Petitioners,

v.

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Respondents.

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
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v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

(Caption Continued on Inside Cover)

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE AMERICAN JEWISH CONGRESS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Respondents.

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No. 90-813

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE AMERICAN JEWISH CONGRESS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens is an important part of the Committee's work, and the Committee has represented minority citizens in challenges to discriminatory judicial elections in Mississippi, Louisiana and Florida under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. In the Louisiana case, the trial court found liability under Section 2 following a full trial on the merits (*Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988)), but was required to vacate the finding because of the Fifth Circuit's holding in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc).

The American Civil Liberties Union is a nationwide membership organization with over 250,000 members. It has a longstanding concern with promoting equality of the franchise. Since 1965, it has maintained a Southern Regional Office which represents minority voters in a number of voting rights cases, including the Voting Rights Act challenge to discriminatory judicial elections in Georgia.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure,

through litigation and education, the constitutional and civil rights of Hispanics living in the United States. MALDEF and its attorneys have engaged in substantial litigation to protect the right of Hispanics to an undiluted vote as guaranteed by the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act.

The American Jewish Congress is a not-for-profit organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of Americans. The Congress believes that in a democracy, these rights depend upon free and fair access to the ballot and the political process. In accordance with that belief, the Congress has long advocated, both in legislatures and courts, vigorous protection of the right to vote.

The American Jewish Committee ("AJC") is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jewish Americans. It has always been the conviction of the AJC that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve those of all Americans, irrespective of race, religion, sex or national origin.

Each of the *amici* participated in the legislative process culminating in the enactment of amended Section 2 in 1982. *Amici* are, therefore, particularly competent to offer views regarding the principles and history associated with the legislation. In addressing the major points that refute the lower court's restrictive construction of Section 2, *amici* have paid special attention to arguments and information not included, or not developed as fully, in the parties' briefs.

SUMMARY OF ARGUMENT

1. Contrary to the holding of the United States Court of Appeals for the Fifth Circuit, Congress did not intend to exclude discriminatory elections for state judges from the coverage of Section 2 at the same time it amended the statute in 1982 to eliminate the requirement of proving discriminatory intent.

A. An examination of the language and structure of Section 2 demonstrates that it covers all elections. Section 2(a) uses the terms "vote" and "voting" to describe Section 2's scope, and those terms are defined in Section 14 (c)(1) of the Act, 42 U.S.C. § 1973*l*(c)(1), to include "any primary, special, or general election . . . with respect to candidates for public or party office." By contrast, Section 2(b) does not serve the function of describing the scope of elections covered, but instead sets forth how "a violation of Section 2(a) is to be established." Thus, there is no warrant for concluding that the word "representatives," which appears only at the end of a conjunctive clause in one sentence of Section 2(b), is a definitional term intended to exclude an entire category of elections from the coverage of Section 2.

B. In addition, even if Section 2(b) could be read to define the scope of elections covered, the use of the word "representatives" does not indicate an intent to exclude elected judges, but instead refers to any elected official. The use of the word in political science literature and historical writing on the constitution and judicial selection, as well as its practical usage, demonstrate that it can readily be employed without excluding elected judges.

C. The purpose of the 1982 amendment was to expand the statute's coverage by eliminating any requirement of proving discriminatory intent. It is inconceivable that Congress, at the same time, would have removed from Section 2 an entire category of elections without any mention of the exclusion in the extensive debates, congressional hearings, and committee reports that accompanied the legislation. Furthermore, testimony at the congressional hearings concerning the 1982 amendments to the Act described pre-1982 vote dilution litigation involving elected judges, discussed discriminatory practices in judicial elections, and mentioned the aspirations of minorities for greater representation on the elected state bench. This contradicts the contention that Congress, without any indication in the legislative history, excluded discriminatory elections for judges from the scope of Section 2.

2. Judge Higginbotham, along with three other judges, concluded that Section 2 covers appellate judges but not trial judges. However, Congress never suggested any intent to limit Section 2 to such selective coverage, and the language, purpose, and legislative history refute Judge Higginbotham's concurrence. The view advanced by the concurrence is that the state interests behind maintaining electoral districts geographically coextensive with trial court jurisdiction are so strong that they automatically outweigh the goals of Section 2 and are therefore invulnerable to challenge under Section 2. That is nothing more than an attack on the potential remedy of subdistricting, by which judges are elected from subdistricts within a judicial district and hear cases from throughout the district. However, even if that analysis of subdistricting were correct, a state has other options to consider when adopting remedial plans—options that would protect any state interest in keeping electoral districts geographically coextensive with the trial judges' normal jurisdiction. The appropriateness of subdistricting as a remedy is not dispositive of the *general applicability* of Section 2 to trial judges. Moreover, there is no reason to believe that the state's interests would be undermined by subdistricting. In addition, the concurring opinion misconstrues the nature of the interests protected by Section 2, and places far too much weight on the "responsiveness" of elected judges to minority litigants if subdistricting were to occur.

3. Judge Clark, in a concurring opinion for himself, contended that Section 2 does not apply to any elections for trial or appellate judges where the judges' jurisdiction is geographically coextensive with their election district. There is no reason to believe Congress intended such an exception to Section 2. As with Judge Higginbotham's concurrence, Judge Clark's view is premised on what he perceives to be the fundamental state interest in retaining judicial election districts that are coextensive with the normal jurisdiction of the judges elected. That view erroneously assumes that subdistricting is the only remedy available for state to adopt, and misperceives both the state's interests and the interests Congress sought to protect with Section 2.

ARGUMENT

I. THE LANGUAGE, STRUCTURE, PURPOSE, AND LEGISLATIVE HISTORY OF SECTION 2 SHOW THAT CONGRESS INTENDED IT TO APPLY TO ALL ELECTIONS AND DID NOT INTEND TO EXCLUDE JUDICIAL ELECTIONS.

In 1982, Congress amended Section 2 to broaden its coverage by eliminating any requirement of proving discriminatory intent. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). The Fifth Circuit held that Congress, by using the word "representatives" in the text of Section 2, intended at the same time to exclude all elections for state court judges from Section 2's coverage, even though no such exclusion is mentioned anywhere in the numerous debates and hearings and the lengthy committee reports on the amendment. The Fifth Circuit's reliance on this one word runs afoul of this Court's frequent admonition that courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotations and citations omitted). As demonstrated below, the language and structure of Section 2, the purpose of

the 1982 amendment, and the legislative history all refute the Fifth Circuit's interpretation.

A. The Language and Structure of Section 2 Compel the Conclusion That All Elections, Including Judicial Elections, Are Covered.

The language and structure of the Act establish that Section 2 is not selective with respect to the offices covered, but is instead all-inclusive of every type of election and elected office.[1] Section 2 itself contains *no* office-by-office list of the specific elective positions that are covered. Instead, Congress established the scope of Section 2 by employing in Section 2(a) two terms—"vote" and "voting"—that are specifically defined in Section 14(c)(1) of the Act to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office." 42 U.S.C. Section 1973*l*(c)(1). These broad definitions clearly encompass elections for judges.

Section 2(a), then, establishes the all-inclusive scope of the elections covered by using these two statutorily defined terms and providing:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.

In contrast, Section 2(b), in which the word "representatives" appears, does not serve the function of defining the scope of the offices covered by Section 2. In-

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[1] This Court has stated that the starting point of statutory interpretation is the language of the statute itself. *See Demarest v. Manspeaker*, 111 S. Ct. 599, 602 (1991).

stead, Section 2(b) defines the *manner* in which a violation of subsection (a) is established. Section 2(b) begins by stating "[*a*] *violation of subsection (a) of this section is established if* [the specified showing is made]." (Emphasis added). The remainder of Section 2(b) sets forth the substantive showing that must be made, and contains a proviso dealing with the significance of the extent to which members of the protected class have been elected to office.

There is no such thing, therefore, as an elective office "covered" in Section 2(a) that is not also "covered" by Section 2(b), since Section 2(a) specifically states that it is to be applied "as provided in subsection (b) of this section," while Section 2(b) specifically provides that it sets forth *how* "a violation of Section 2(a) is established." Given this statutory structure and language, there is no support for the conjecture that an entire category of elections covered by Section 2(a) could suddenly turn up missing in Section 2(b).[2]

Indeed, most of the language of Section 2(b) echoes the same broad phrasing found in Section 2(a). The first sentence of Section 2(b) refers broadly to "the political processes leading to nomination or election in the State or political subdivision"—phrasing which by its terms incorporates all electoral processes without exception. That sentence continues by referring to the opportunity enjoyed by members of the protected class "to participate in the political process"—again, no exclusion of or reference to any particular category of elections—"and to elect

[2] Under the Fifth Circuit's analysis, judicial elections are covered by Section 2 as long as *intentional* discrimination is proven, while challenges to all other categories of elections are not governed by any intent requirement. 914 F.2d at 625 n.6. It is impossible to find this distinction anywhere in the statutory language. In *Burlington Northern R. Co. v. Okla. Tax Commission*, 481 U.S. 454, 463-64 (1987), this Court unanimously reversed a Court of Appeals holding that would have read into a statute an intent requirement for some types of actions covered by the statute but not for others.

representatives of their choice." The phrase as a whole ("to participate in the political process and to elect representatives of their choice") clearly focuses on the actions and opportunities of the protected class and not on the specific categories of offices subject to the Act. It would be a strange method of drafting that would set about to exclude a category of elections from the statutory coverage by placing the all-important definitional term only at the end of a conjunctive clause in a long sentence that otherwise broadly defines the substantive standards in question.[3] A straightforward and natural reading of the statutory language requires the conclusion that Congress did not intend the word "representatives" to exclude judicial elections from Section 2's coverage.

B. The Word "Representative" in Section 2(b) Refers to All Elected Officials and Does Not Exclude Judges.

There is a much simpler explanation for Congress' use of the word "representatives" than that employed by the Fifth Circuit majority. The portion of subsection (b) in which the word appears was taken from *White v. Regester*, 412 U.S. 755 (1973), which refers to minority groups whose members have less opportunity than others "to participate in the political process and to elect legislators of their choice." *Id.* at 766. Congress substituted the word "representatives" for "legislators." As the Sixth Circuit said in *Mallory v. Eyrich*, 839 F.2d 275 (1988), "[i]t seems evident that Congress was seeking a broader word to make it clear that subsection (b) is not

[3] The parallel language defining the scope of Section 2 and Section 5 of the Act—the latter of which has been interpreted by this Court to encompass elections of state court judges, *Georgia Board of Elections v. Brooks*, 111 S. Ct. 288 (1990), *summarily aff'g Brooks v. State Board of Elections*, No. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court)—further establishes that Section 2 applies to judicial elections. This point is developed in the briefs of the petitioners and will not be discussed further here.

limited to legislative races." *Id.* at 279. Without pausing to list all of the covered offices by title—an unnecessary exercise since the scope of the Act is defined elsewhere—the drafters of Section 2 substituted a more generic term in place of the word "legislators."

The Fifth Circuit's holding hinges on its belief that the word "representatives" can have only one meaning, and that meaning necessarily excludes judges. 914 F.2d at 625-27. Political science literature refutes such a narrow and singular understanding of the concept of "representation." For instance, Professor Hannah Pitkin's highly-regarded work, *The Concept of Representation* (1967), notes that "[c]ourts, judges and juries have been discussed as representative organs of the state." *Id.* at 227. Pitkin offers several examples of how judges can be considered "representatives":

> From a formalistic standpoint, a judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state. Hence he represents the state. In a democracy where all agencies of the government are servants of the sovereign people, the judge might be said to represent the people. From the "standing for" interpretation, he may represent by embodying the values of a society. From the doctrine that anyone whose commands are obeyed and whose leadership is accepted is a representative, a judge certainly represents. . . .

Id. at 116-117.

Use of the words "representatives" and "represent" with respect to judges are features of the historical writing on the Federalist and Jacksonian eras, the seminal moments in the establishment, respectively, of the federal and the elective state judiciaries. James Wilson, distinguished jurist and delegate to the Constitutional Convention, wrote of "[t]he extension of the theory and practice of representation through *all* the different de-

partments of the state" in America. 1 *The Works of James Wilson* 311 (R. McCloskey, ed. 1967) (emphasis added). Professor Edmund S. Morgan, writing about the development of state constitutions and the federal constitution in the United States, said this:

> A constitution superior to ordinary legislation could insure a strong position in government to the executive *and the judiciary* as well as the legislature, by making them all representatives of popular sovereignty and guaranteeing to them all a share in the power that supposedly emanated from the people.

E. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 260-61 (1968) (emphasis added). *See also*, G. Wood, *The Creation of the American Republic, 1776-1787* 456, 460, 596-99 (1969) (noting that American political thought of the late 1780s viewed all three branches of government as representatives of the people).

Many reformers of the Jacksonian era who favored the election of judges certainly considered judges chosen by the people to be representatives in some sense. Writing of that time, Charles M. Cook noted the belief of reformers that, through election, judges "would be made representative to the people and sensitive to their needs." C. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 161 (1981).[4]

The Fifth Circuit's opinion suggested that judges can never be considered "representatives" because they occasionally must make decisions contrary to public will

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[4] *See also*, F. Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy* 279 (1930); K. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System* 103 (1979); Hall, "The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920," in *Ambivalent Legacy: A Legal History of the South* 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984).

and may not favor any particular constituency in discharging their duties. 914 F.2d at 626. Of course, the same is true of any number of elected executive or quali-legislative officials whom the Fifth Circuit would consider to be "representatives," such as prosecutors, constables, civil service boards, tax assessors, recorders of deeds, and prothonotaries. Indeed, legislators take an oath to uphold the Constitution, and occasionally act against the public will in fulfilling that oath.

Moreover, judges sometimes do consider and translate the popular will into judicial decisions, for instance in the development of the common law or the determination of what constitutes cruel and unusual punishment. Thus, judges are "representatives" or agents of the public in the ongoing evolution of legal doctrine.[5] Elected judges can also be said to "represent" the choice of the voters as to who will best serve the public good in discharging the duties of the judiciary.

Thus, the use of the word "representatives" does not evidence an intent to exclude elected judges.

C. The Purpose of the 1982 Amendment Was to Broaden Section 2's Coverage, and the Legislative History Belies Any Intent to Exclude Judicial Elections.

Congress' purpose in amending Section 2 was to broaden the Act's coverage by eliminating any requirement of proving intentional discrimination. *Thornburg v. Gingles*, 478 U.S. at 35. The Fifth Circuit's holding that Congress, at the same time, narrowed the coverage of Section 2 to exclude an entire category of elections

[5] Indeed, in a recent letter to the federal district judge in *Clark v. Roemer*, No. 90-952, the case involving Louisiana trial and appellate judges, the attorney for the State defendants in both *Clark* and in *Chisom v. Roemer*, No. 90-757, Robert Pugh, wrote of one elected Louisiana judge who had retired and who "is no longer *representing* his former district" (emphasis added) (December 28, 1990 letter from Robert Pugh to Hon. John V. Parker, reproduced in the attached appendix).

simply cannot be squared with the well-documented congressional intent, and is unsupported by even a sliver of evidence in the legislative history.[6]

[6] The Fifth Circuit incorrectly relied upon an alleged "presumption" that Congress intended to incorporate the phraseology of cases holding the one-person, one-vote principle inapplicable to judicial elections. 914 F.2d at 628. None of those cases are cited in the legislative history of the 1982 amendment. *See Demarest v. Manspeaker*, 111 S. Ct. at 603-04 (declining to apply a presumption that Congress incorporated prior administrative and judicial decisions in a statute where there was no evidence Congress was aware of the prior interpretations and where the statutory language did not support the interpretation at issue). Moreover, the presumption, if applicable, supports plaintiffs, because it imputes to Congress knowledge only of "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Much more pertinent to the 1982 Section 2 amendment than the one-person, one-vote cases is the 1980 holding of the Fifth Circuit in *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980). There, the Fifth Circuit held that a racial vote dilution challenge could be maintained against at-large judicial elections under the Fourteenth and Fifteenth Amendments irrespective of the inapplicability of the one-person, one-vote rule. Congress' presumed awareness of *Voter Information Project* would indicate that discriminatory judicial elections are not excluded from the coverage of amended Section 2, especially given that Congress broadened the statute in 1982 so that a showing of intent as required in litigation under the Fourteenth and Fifteenth Amendments would not be necessary.

Moreover, the Senate Report cites a 1977 en banc decision of the Fifth Circuit in a successful vote dilution challenge to districts used to elect county boards of supervisors *and* justices of the peace (who are trial judges in Mississippi). *See* S. Rep. at p. 29 n.114, 31 n.121, citing *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977) (*see* 554 F.2d at 140 n.1 for description of offices at issue in *Kirksey*). *See also, e.g., United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 956 n.9 (5th Cir. 1978) (noting that districts at issue in vote dilution challenge were used to elect justices of the peace, among other officials). These and other vote dilution suits dealing with county boards of supervisors and justices of the peace in Mississippi were also specifically discussed in the testimony of several witnesses at the House and Senate hearings. *See* Part I.C, *infra*, for a discussion of this testimony.

To the contrary, the available legislative history supports the proposition that all elections, including judicial elections, remain within the coverage of amended Section 2. As stated in the Senate Judiciary Committee report accompanying the 1982 amendment, Congress amended Section 2 in order "to prohibit *any* voting practice, or procedure [that] results in discrimination" without regard to whether there is proof of discriminatory intent. S. Rep. 97-417, 97th Cong. 2d Sess. 2 (1982), *reprinted* in 1982 U.S. Code Cong. & Adm. News 177, 179 (emphasis added). *See Thornburg v. Gingles*, 478 U.S. at 43. While various lower court opinions [7] and the briefs of some of the parties in this Court discuss other aspects of the legislative history, *amici* focus here particularly on the congressional hearings held on the 1982 extension and amendment of the Voting Rights Act.[8]

In interpreting the Voting Rights Act, this Court has looked to the purposes of the Act and the forms of discrimination it was designed to remedy, including those described in the testimony of witnesses during the congressional hearings. *See, e.g., Perkins v. Matthews*, 400 U.S. 379, 387-389 (1971); *Allen v. State Board of Elections*, 393 U.S. 544, 563-569 (1969). At the 1981 and 1982 congressional hearings in both the House and the Senate, numerous minority witnesses and representatives of civil rights organizations testified about discrimination in judicial elections, presented examples of how vote dilution hampered the election of minority

[7] *See, e.g., Mallory v. Eyrich*, 839 F.2d at 278-80.

[8] *Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) ("House hearings"); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 2d Sess. (1982) ("Senate hearings").

judges, and articulated the need for better minority representation on the bench.

Several of the witnesses gave testimony and statements concerning extensive pre-*Bolden* litigation over dilution of black voting strength in the drawing of districts used to elect Mississippi county supervisors, justice court judges (justices of the peace), constables, county school board members, and county election commissioners.[9] Mississippi State Senator Henry J. Kirksey described the outcome of one such lawsuit in 41-percent black Warren County, Mississippi, to respond to Senator Metzenbaum's questions concerning whether the use of the "results" test prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), had resulted in "proportional representation":

> In 1979, the Federal district court ordered into effect a plan which resulted in the election of one black county supervisor, one black justice of the peace, and two black constables—the first black elected officials in Warren County since reconstruction. Since there are five supervisors, justices of the peace, and constables from each district, we clearly did not obtain proportional representation.

Senate hearings at 669. Referring to this same litigation, a statement submitted by Robert M. Walker, Field Director of the Mississippi NAACP, noted that as a result of the litigation "a Black supervisor, a Justice Court judge and two constables were elected, giving Black Warren countians representation for the first time since the 19th century." House hearings at 2648.[10]

[9] In Mississippi, justice court judges, formerly known as justices of the peace, are judicial officers at the trial court level.

[10] *See also* House hearings at 1745 (testimony of Senator Kirksey in response to questioning by Representative Don Edwards, House Subcommittee Chairman, explaining that "we are able to elect two county supervisors, two justices of the peace, and some other officers" as a result of voting rights litigation in Hinds County, Mississippi).

Amicus Lawyers' Committee for Civil Rights Under Law submitted a report to both the House and Senate subcommittees which included a detailed description of the Mississippi lawsuits over county districting and made numerous specific references to the impact of the lawsuits on county justice of the peace elections.[11] The Senate Judiciary Committee Report cites one of these lawsuits in which the Fifth Circuit held that discriminatory lines used to elect county boards of supervisors, justices of the peace and other county officials were unlawfully dilutive of black voting strength.[12]

The hearings included examples of the difficulties faced in electing minorities to judicial office. A witness representing *amicus* MALDEF helped document the continuing impact of race in electoral politics by describing in detail how the local Democratic committee in Aransas County, Texas, engineered the election of a deceased person as justice of the peace in order to prevent the election of the first Mexican-American to that office.[13] Full-page newspaper advertisements, reprinted in the House hearings transcript, advised voters:

> THE NAME OF LAWRENCE MILLER, Candidate for Justice of the Peace, Precinct 1, will be on the Democratic Ballot on May 6th. You are entitled to vote for him even though he is now deceased. If Judge Miller receives a majority of the votes cast, the Aransas County Democratic Committee will convene and select a nominee whose name will be certified to be placed on the General Ballot for November.

[11] Report of the Lawyers' Committee for Civil Rights Under Law, *Voting in Mississippi: A Right Still Denied*, reprinted in House hearings at 499, 516-28. *See also* Senate hearings at 673 (prepared statement of Sen. Kirksey, noting submission of report to Senate subcommittee), 1228 (prepared statement of Frank R. Parker, Esq., summarizing report). The report is cited at several points in the Senate Report accompanying amended Section 2. *See* S. Rep. at 10 n.21; 10 n.22; 13 n.35; 51 n.177.

[12] *Kirksey v. Board of Supervisors of Hinds County* (cited in S. Rep. at 29 n.114, 31 n.121).

[13] House hearings at 930 (testimony of Joaquin Avila, Esq., of *amicus* MALDEF). See also id. at 940-42 (prepared statement of Avila); 1253 (testimony of Ruben Bonilla, president of petitioner LULAC, describing same election).

House hearings at 1010. Moreover, witnesses specifically noted the adverse effect of at-large judicial elections on the potential for minority electoral success. Mississippi NAACP Field Director Robert Walker described an attempt by the Mississippi legislature to change from district-based to at-large justice court elections, and stated "[i]f accepted, this obvious attempt to dilute the Black vote would set this State back 100 years." House hearings at 2647. Mississippi State Representative Fred Banks decried this same effort to establish "an at-large system for the election of justices who are now elected by district in the counties." House hearings at 550. The record also contains references to the role played by polarized voting in judicial elections.[14]

Witnesses also testified about minority aspirations to judicial office in the context of the Voting Rights Act. From the first black elected state judge in majority-black Sumter County, Alabama, Honorable Eddie Hardaway, Jr., Congress heard about the importance of the Act in terms of the racial integration of the bench:

[14] *E.g.*, House hearings at 949 (prepared testimony of Avila, describing how a minority candidate for a Texas Court of Appeals judgeship was defeated by racially polarized voting in a 1980 election); Senate hearings at 306 n.33 (prepared statement of Vilma Martinez, President and General Counsel of MALDEF, noting that evidence of polarized voting in justice of the peace elections was submitted to the court in *Seamon v. Upton*, E.D. Tex. No. P-81-19-CA, the Texas congressional reapportionment challenge); House hearings at 260 (prepared statement of Dr. James W. Loewen, Associate Professor of Sociology, University of Vermont, referring to racial polarization in an Alabama judicial race).

> I sit here today, as living proof that a poor, rural black country boy in Alabama can, as a result of the Voting Rights Act, be elected to public office. Without a Voting Rights Act, there is no doubt in my mind that I would not be the district judge of Sumter County.

House hearings at 825.[15] *See also* House hearings at 571 (testimony of Bennie Thompson, contrasting fairness in the administration of justice before and after his election as mayor and judge of Bolton, Mississippi, in response to questioning by Rep. Edwards).[16]

Witnesses made it clear that judicial elections were considered an important target for efforts to increase minority representation in elected office. Describing offices being targeted by black candidates in Sumter County, Alabama, Judge Hardaway stated:

> In 1982, most major offices in county government will be up for grabs. That is, the probate judge, tax assessor, tax collector, circuit clerk, sheriff, and three county commission[ers] will be up for re-election. As it now stands, there is a strong possibility that blacks may be elected to some of these positions.

House hearings at 825. Adolfo Alvarez, a Frio County, Texas commissioner, told the House subcommittee that "[b]ecause of the existence of the Voting Rights Act and our work in the comunity, we now have two Mexican American county commissioners and three Mexican American justices of the peace out of four." *Id.* at 1188.

Additional witnesses pointed to the lack of minority representation on the bench as an evil that had persisted despite advances made under the Voting Rights Act to date. George State Senator Julian Bond noted that "even though Blacks now represent over 26 percent of the Georgia population, they continue to be underrepresented in the halls of the General Assembly, the City Halls, the County courthouses, and the Judicial Chambers of our state." *Id.*, p. 234 (prepared statement). Professor Brian Sherman, in discussing evidence of "low or no [black] representation in county government" in Georgia, pointed out that "[o]f the 47 counties for which we have information, only 1 reports the election of a black judge to superior court since the passage of the Voting Rights Act." House hearings, p. 574.[17]

These references in the hearings to judicial elections are consistent with the understanding that the Voting Rights Act and its provisions, including Section 2, covered all elections. No witness and no member of Congress at any time suggested that judicial elections should be excluded from Section 2's coverage. All of this belies the notion that Congress intended to narrow the Act to exclude judicial elections at the same time it was broadening the Act to better protect the victims of racial discrimination.

II. NOTHING INDICATES CONGRESS INTENDED SECTION 2 TO APPLY ONLY TO ELECTIONS FOR APPELLATE COURT JUDGES AND NOT TO ELECTIONS FOR TRIAL COURT JUDGES.

Part I of Judge Higginbotham's concurring opinion concluded that Congress intended to include judicial elections within the ambit of Section 2. In Part II, however,

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[15] *See also* Senate hearings at 748 (testimony of Abigail Turner, Esq., referring to Judge Hardaway's election).

[16] As Mr. Thompson explained, in towns under 10,000 in Mississippi at the time, the mayor also served as city judge. Under the Fifth Circuit's holding, elections would be covered by Section 2 only with respect to the mayor's office and not with respect to the judicial position.

[17] *See also Voting in Mississippi: A Right Still Denied*, reprinted in House hearings, at 503 (listing numbers of blacks elected to Mississippi Supreme Court, county courts, and justice courts as of 1980). For additional references to judicial elections in the House and Senate hearings, *see* House hearings at 38, 193, 239, 280, 502, 763, 804, 806, 937, 1182, 1205, 1515, 1528, 1535, 1839; Senate hearings at 777, 788-89.

that opinion concluded that while elections for appellate court judges are covered, elections for trial judges are not. That portion of the opinion did not discuss the language of the statute or congressional intent, and is, at most, an explication of what its sponsors believe Congress *should have* intended with respect to Section 2 and trial judges. As to the real issue of what Congress *did* intend, there is absolutely no indication of a desire to include elections for appellate judges while exempting elections for trial judges from Section 2's coverage. As demonstrated in Part I of this brief, the language, purpose and legislative history establish that no elective office or category of elections is excluded from the scope of Section 2. Indeed, the fact that Section 5 covers elections for trial judges, *see Georgia Board of Elections v. Brooks*, also makes it highly unlikely Congress intended to exclude trial judges from the coverage of Section 2.

The concurrence concluded that the state interests behind retaining electoral districts geographically coextensive with trial court jurisdiction are so compelling that they *always* outweigh the interests Congress sought to protect with Section 2, and are therefore immune from Section 2's ban on racial discrimination.

> We are persuaded that, for purposes of the Voting Rights Act, because the fact and appearance of independence and judicial fairness are so central to the judicial task, a state may structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here—tying elective base and jurisdiction—defines the very manner by which Texas' judicial services are delivered at the trial court level . . . . Stated in traditional Fourteenth Amendment terms, there is compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest.

911 F.2d at 646. This is a critique of the potential remedy of subdistricting, by which judges are elected

from subdistricts within a judicial district and hear cases from throughout the district. With subdistricts, there would be, in the words of the concurrence, no "tying [of] elective base and jurisdiction." Sections C and D of part II of Judge Higginbotham's opinion are largely a discussion of what he perceives to be the drawbacks of subdistricting. The concurrence cited the so-called "single-member office" exception articulated in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), in support of the exclusion of trial judges from Section 2's coverage.

This section of the brief will first discuss how any state interests that purportedly underlie at-large trial judge elections can be accommodated within the context of Section 2 enforcement inasmuch as remedies other than subdistricting are available. Second, it will demonstrate that even if subdistricting were the only remedial option, the state's interests would not be threatened. Third, it will show the inapplicability of any "single-member office exception." Finally, it will discuss Judge Higginbotham's mistaken focus on responsiveness and his failure properly to consider the congressional purposes manifest in Section 2.

A. The Appropriateness of Subdistricting as a Remedy Is Irrelevant to the General Applicability of Section 2 Inasmuch as a State May Choose Remedies Other Than Subdistricting That Adequately Protect Any Interests It Has in At-Large Trial Court Elections.

Even if Judge Higginbotham's belief about the undesirability of subdistricting were correct, that has nothing to do with the *general applicability of Section 2* to elections for trial judge. Other remedies are available to the states that can protect any interests a state may have in retaining a congruence between electoral base and jurisdiction.

The matter of the appropriate remedy in a vote dilution case is first left to the responsible state officials.

White v. Weiser, 412 U.S. 783, 794-95 (1973). Those officials could choose from a number of options, any of which would hold out the promise of remedying racial discrimination yet retaining a coextensiveness between electoral base and jurisdiction. The options include "limited voting," which maintains at-large elections but alters other election features—the main alteration being a reduction in the number of votes available to each voter—to prevent white voters from sweeping all of the seats and to give minority voters an opportunity to elect candidates of choice to some of the judgeships. *See Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988) (approving a consent decree adopting limited voting as a remedy in a Section 2 challenge to at-large elections); Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.C.L. 173, 223-31 (1989). They include "cumulative voting," which retains at-large elections and permits each voter to have as many votes as there are seats, but allows the voter to cast multiple votes for a single candidate. *Id.* at 231-36. They include the creation of smaller and racially fair judicial election districts within a pre-existing district, with cases arising from the new election districts assigned only to judges chosen from those election districts (with judges, of course, being able to help out with overloaded dockets of judges from other election districts just as visiting judges do now in Texas and most other states).[18] The remedial options might include, in a given case, the realignment of counties among existing judicial districts to change the demographics of

[18] The *LULAC* majority and concurring opinions assumed that all subdistricting systems, and all remedial election districts, would necessarily be "single-member." 914 F.2d at 623 (majority opinion); *id.* at 633 (Clark concurrence); *id.* at 649-51 (Higginbotham concurrence). That is not the case. Particularly in urban areas, it is frequently possible to draw majority black or Hispanic election districts that are multi-member and would elect several judges.

the districts, with judges hearing cases arising only from their realigned district. *See SCLC v. Siegelman*, 714 F. Supp. 511, 512 (M.D. Ala. 1989) (challenging the boundary lines between existing judicial districts).

Of course, the initial choice as to the best form of electing judges in the wake of a finding of a Section 2 violation belongs to the states themselves. In the weighing of the various state interests, some may choose subdistricting and some may choose other remedies. At the present time, the only issue before this Court is whether Section 2 is generally applicable. The appropriateness of subdistricting in light of any countervailing state interests is not an issue before this Court, and should be addressed only if and when it is.

B. Even If the Appropriateness of Subdistricting Were Somehow Relevant, the State Interests Identified by the Concurring Opinion Would Not Be Infringed by Subdistricting and Do Not Outweigh the Congressional Purpose of Eliminating Discrimination in Elections.

Even if the concurrence's view of the appropriateness of subdistricting were relevant, it is based upon asserted state interests that would not be infringed by subdistricting. Before discussing those, it is important to note that Congress, in amending Section 2, said the state's policy behind a particular electoral system is only one of many factors to be considered. S. Rep. at 29 and n. 117. The Senate Report—which this Court has said is the "authoritative source" for determining the congressional intent behind Section 2, *Thornburg v. Gingles*, 478 U.S. at 43, n.7—made it abundantly clear that the application of a state's policy in support of a given election system "would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. at 29, n. 117. Certainly, if state policy cannot vitiate an otherwise successful Section 2 case, neither can it banish a whole category of elections

from the scope of Section 2 without some congressional indication that the category is excluded.

The state interest that Judge Higginbotham believed would be unalterably compromised by subdistricting is what he called "the fact and appearance of independence and fairness." 914 F.2d at 646.[19] However, nothing suggests that judges elected from subdistricts would be less independent and fair than judges elected from the current system. It would be racially insulting for the State of Texas to believe that judges elected by minority voters will be less independent and fair than the current judges, almost all of whom are white and are elected by white voters with little say from minority citizens. Indeed, if there is any unfairness, it comes from the present system that robs minority voters of an equal vote, and perpetuates a nearly all-white judiciary in the midst of a multiracial society.

Also, the state has no basis to contend that a judge elected from one subdistrict would be biased, or would appear biased, in a case involving a litigant from his or her subdistrict and a litigant from another. If Texas were concerned about that, it would not allow, for instance, a judge from Dallas to sit in a case in which

[19] Judge Sam Johnson's dissent from the Fifth Circuit decision in *LULAC* demonstrates that Texas does not really believe its state interests are unalterably compromised by subdistricting. As Judge Johnson states, the Texas Constitution authorizes subdistricting for justices of the peace and subcounty districts for district courts. 914 F.2d at 669 (Johnson, J., dissenting). Moreover, it should be noted that the district court in *LULAC* found the state's asserted interests to be unpersuasive. That is a finding of fact subject to the clearly erroneous standard of Rule 52, F.R. Civ.P.; *Thornburg v. Gingles*, 478 U.S. at 77-79. The United *States*, as *amicus curiae* in the en banc Fifth Circuit, said "there is evidence in this record which undermines the notion that a remedy which would create subcounty districts would result in biased decisionmaking or even the appearance of biased decisionmaking." Supplemental Brief for the United States as *Amicus Curiae*, *LULAC v. Mattox*, No. 90-8014 (5th Cir.).

one litigant is from Dallas and the other from Houston. No such prohibition exists in state law.[20]

What the state does know is that under a remedial plan minority voters would have a better opportunity to elect candidates of their choice to office, and that some of those candidates would most likely be minorities. But an objection to the application of Section 2 based on such considerations would be intolerable.

Judge Higginbotham also contended that the legitimacy of judicial decisions might come into question because a judge elected from a portion of the county would be making decisions "for the county as a whole." 914 F.2d at 650. This implies that no decision of a trial judge is legitimate unless it is made by a judge chosen by all of the voters. If that were the case, visiting judges would never be allowed to hold court in an area from which they were not elected. Retired judges would never be allowed to step in to help out with overload dockets because the voters had not elected them to a current

[20] Judge Higginbotham's opinion said the State eliminated the appearance of bias in the present system by creating an elaborate set of rules controlling venue. He also said that no similar system of venue rules exists for subdistricts. 914 F.2d at 651. The point about venue rules is that they provide a set of neutral guidelines to determine whether the case should be tried in one district or another (and before a judge from one district or another), thus preventing arbitrary decisions about the matter to be made by someone interested in favoring one litigant over the other. In a subdistricting system, as under the present system, there would be a neutral system of assigning cases to judges, thus preventing arbitrary case-assignment decisions from being made by someone interested in favoring one litigant over the other. Once a decision regarding venue is made according to neutral guidelines, the State of Texas has indicated no concern about having a judge elected in Dallas hear a case involving one litigant from Dallas and another from Houston. Similarly, once a case assignment is made according to neutral guidelines, the State will have no difficulty with a judge elected out of one subdistrict hearing a case involving one litigant from that subdistrict and one from another.

term. Interim judges could not be appointed to fill vacancies prior to an election.[21] Thus, it is clear that the state's interest in the legitimacy of judicial decisionmaking would not be impaired by subdistricting.

All of this indicates that, even if subdistricting were the issue before this Court, the state's interests would not be undermined by the use of a subdistricting remedy.

C. No "Single-Member Office" Exception Removes Trial Judges from the Coverage of Section 2.

The reasoning of the "single-member office" exception articulated by a 2-1 panel majority of the Second Circuit in *Butts v. City of New York* has never been adopted by this Court, and it seems doubtful it would be.[22] Even if it were, it is inapplicable here. By its own terms, the *Butts* "single-member office" exception applies only to offices of which there is one office holder in the jurisdiction, such as a mayor. This notion is applicable to at-large elections only in the logical sense that a mayor cannot be elected other than at-large.

[21] Subdistricts were adopted as a court-ordered remedy in the Secton 2 case involving trial judges in Mississippi, *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). A number of black judges were elected as a result, but there is no evidence that the Mississippi judicial system has suddenly become infused with a threat to what Judge Higginbotham called "the fact and appearance of independence and fairness."

[22] In *Butts*, the panel majority said runoff requirements for what it called "single-member offices," such as mayor, may not be challenged under Section 2. This holding is inconsistent with the language of Section 2 and the legislative history. As the Solicitor General has stated, the language of Section 2 makes no exception for majority vote runoff requirements "either for single member offices or other types of elected positions." Brief for the United States as Amicus Curiae in *Whitfield v. Clinton*, No. 90-383 (pet. for cert. denied 2/25/91), at 11. The Senate Report accompanying the 1982 amendment indicates that Section 2 applies to majority vote runoff requirements. S. Rep. at 6, 10, 22, 29-30. Thus, it is doubtful that *Butts* was correct when it said runoff requirements for "single-member offices" are immune to Section 2.

By contrast, there are a number of trial judges elected in each of the challenged judicial election districts in Texas. It is not necessary that they all be elected by an at-large, winner-take-all system. The fact that they often exercise decisionmaking power by themselves does not make them "single-member offices" for purposes of *election*. Under the Voting Rights Act, it is the electoral structure that is important, and Congress has never indicated that the function of the office can insulate racially exclusionary election schemes from challenge. If function could preclude coverage of the Act, discriminatory at-large elections for city commissions, in which each commissioner exercises independent decisionmaking authority over a particular area of city operations, might be shielded from challenge. *See, e.g., Buchanan v. City of Jackson*, 708 F.2d 1066, 1067-68 (6th Cir. 1983). That has never been the law.

The "single-member-office" argument, then, as applied to judicial districts that have multiple judgeships, is merely another way of expressing the conclusion that trial judges should not be elected from subdistricts. This remedial concern, again, is not dispositive of Section 2's coverage.

D. The Concurrence Failed to Consider the Interests in Non-Discriminatory Elections That Congress Attempted to Further Through Section 2, and Instead Focused Exclusively on the Issue of Responsiveness.

Judge Higginbotham's balancing of the state's alleged interests was further skewed by his failure to perceive the true nature of the countervailing interests in non-discriminatory elections that Congress has sought to vindicate through Section 2. The Higginbotham concurrence embraced the erroneous notion that Section 2's sole function is to increase minority impact on the day-to-day decisions of governmental officials, including judges, and concluded that subdistricting would not help most mi-

nority *litigants* appear in front of minority judges. 914 F.2d at 649-50.[23]

To the contrary, Section 2's purpose is not simply to increase the extent to which minority interests are considered in government decisions—in this instance, decisions involving individual litigants—but is to give minority voters a fair opportunity to elect candidates "of their choice" (to use the language of Section 2). When voters—be they white, black or Hispanic—vote for judicial candidates, they rarely vote in the expectation that they someday will appear as litigants before the judges who are elected. Instead, they vote for the candidates they believe will do the best job of administering justice. The purpose of Section 2 is to give minority voters a meaningful voice in those electoral decisions.

The legislative history of the 1982 amendment made it clear that the responsiveness of governmental officials to minority interests is a factor of secondary importance in Section 2 cases, and said that "[u]nresponsiveness is not an essential part of plaintiff's case" under Section 2. S. Rep. at 29 and n.116 (1982). Thus, even if minority interests are already fully taken into account in governmental decisions, Section 2 prohibits an election system that denies minority voters an equal and fair opportunity to elect candidates of their choice.

In summary, Judge Higginbotham is wrong to suggest that the state's legitimate interests will be undermined by subdistricting. Moreover, he fails to balance those interests against the fundamental concern protected by Section 2, and that is the right of minority voters to elect candidates of choice free from racially discriminatory election structures.

---

[23] Of course, as a result of the present election districts, very few litigants, minority or white, appear in front of minority judges because there are so few.

III. NOTHING INDICATES CONGRESS INTENDED TO EXCLUDE FROM SECTION 2'S COVERAGE AT-LARGE JUDICIAL ELECTIONS FROM DISTRICTS CO-EXTENSIVE WITH THE JURISDICTIONAL AREA SERVED BY THE JUDGES ELECTED.

Judge Clark's concurrence on behalf of himself is similar to Judge Higginbotham's in that Judge Clark believes the state's interest in what he calls "due process neutrality" should immunize from Section 2's coverage all elections from judicial districts that are geographically coextensive with the jurisdictional area served by the judges elected. Judge Higginbotham would carry that principle forward to exclude all trial judge elections. By contrast, Judge Clark would use it to exclude elections for both trial and appellate judges if the election district and the jurisdiction are coextensive, while he leaves open the possibility of a Section 2 challenge to an election district, either trial or appellate, smaller than the jurisdictional area served by the judge elected.

There is absolutely no reason to believe Congress intended such an exception to Section 2's coverage. One of the primary electoral devices Congress intended to combat with Section 2 is discriminatory at-large elections. S. Rep. at 30. Section 5, of course, covers at-large elections where electoral base and jurisdiction are equivalent, and it is doubtful Congress intended to exclude from Section 2's scope a type of election covered by Section 5. *See Georgia Board of Elections v. Brooks.*

Moreover, Judge Clark's view suffers from the same problems as Judge Higginbotham's. They are both based on a belief that the election district and the jurisdictional area must be equivalent to insure what Judge Clark calls "due process neutrality." As mentioned in the discussion of Judge Higginbotham's opinion, that view erroneously assumes that subdistricting is the only available remedy. Also, as stated previously, it wrongly assumes that the state's interest in due process neutrality will be undermined by subdistricts even if they were the only available

remedy, and it fails to consider the overriding congressional purpose of eliminating racial discrimination in all elections.

For all of these reasons, Judge Clark's reasoning, like Judge Higginbotham's, provides no basis for sustaining the judgment below in the *LULAC* litigation.

CONCLUSION

For these reasons, the judgment of the court below in these cases should be reversed.

Respectfully submitted,

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APPENDIX

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Robert G. Pugh, Jr.
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December 28, 1990

Honorable John V. Parker
Chief Judge
United States District Court
Middle District of Louisiana
707 Florida Street
Baton Rouge, Louisiana 70801

Re: Plaintiffs' Motion to the Three-Judge Court To Prevent Judges from Holding Office in the Judgeships for Which No Candidate was Elected Because the Injunction of the United States Supreme Court
Clark v. Roemer, No. 86-435, Section A
U.S. District Court for the Middle District of Louisiana

Dear Judge Parker:

I have been able to determine that the only individual judges who might be affected by the outcome of the captioned motion would be:

Judge James H. Boddie, Jr.
Fourth Judicial District, Division G

Judge Arthur J. Planchard, Jr.
Fourteenth Judicial District, Division E

Judge Charley Quienalty
Fourteenth Judicial District, Division G

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Judge Hawsey, who would have otherwise been affected, retired, he is no longer representing his former district, however, he is serving as an ad hoc judge without a district designation on a series of asbestos cases.

By copy of this letter to Mr. McDuff and Mr. Johnson, I am advising him of my findings.

Yours very truly,

/s/ Robert G. Pugh
ROBERT G. PUGH

RGP/mp

cc: Robert B. McDuff, Esquire
Ernest L. Johnson, Esquire

(8)

Supreme Court, U.S.
FILED
MAR 1 1991
OFFICE OF THE CLERK

NO. 90-757

In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, et al.,
Petitioners,

VERSUS

CHARLES E. ROEMER, et al.,
Respondents,

CERTIORARI TO THE UNITED STATES
COURT OF APPEAL FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF SUBMITTED ON BEHALF OF AMICUS CURIAE, DARLEEN M. JACOBS, A PROFESSIONAL LAW CORPORATION SUPPORTING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

NOW INTO COURT, through undersigned counsel, comes DARLEEN M. JACOBS (A PROFESSIONAL LAW CORPORATION), amicus curiae, who respectfully moves this Honorable Court for leave to file the present brief. The said brief, filed in support of petitioners, RONALD CHISOM, ET AL, requests a reversal of the decision rendered in this cause by the United States Court of Appeal for the Fifth Circuit.

Counsel for amicus curiae, a member of the bar of this Court, respectfully certifies that counsel for all parties heve granted their consent for amicus curiae to present

and file the present brief, and letters of Consent to Participate by all parties are under separate cover.

DARLEEN M. JACOBS

QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, as amended, govern the the election of judicial officers?

PARTIES

The following parties were in the the courts below:

Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon, III and the Louisiana Voter Registration/Education Crusade, Plaintiffs;

The United States of America, Plaintiff-Intevenor;

Charles E. Roemer, in his capacity as governor of the State of Louisiana, W. Fox McKeithen, in his capacity as Secretary of the State of Louisiana, and Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana, Defendants.

Pascal F. Calogero, Jr., and Walter F. Marcus, Jr., Defendants-Intervenors.

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NO. 90-757

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD CHISOM, et al.,
Petitioners,

VERSUS

CHARLES E. ROEMER, et al.,
Respondents,

STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae, Darleen M. Jacobs, requests leave to appear at oral arguments.

STATEMENT REGARDING JURISDICTION

Amicus curiae respectfully adopts the jurisdiction contained in the original brief of the plaintiffs-appellants, Ronald Chisom, et al. Amicus further submits that jurisdiction in uncontested.

STATEMENT REGARDING AMICUS CURIAE

Amicus curiae herein is a New Orleans law corporation interested in promoting the election of a Supreme Court Justice in and for the City of New Orleans, and the Parish of Orleans.

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. Section 1973, which provides pertinent part:

> "(A) No voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or implied by a state of a political subdivision in the manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color; (B) A violation of subsection (A) at this section is established if, based on the totality of the circumstances, it is

> shown that the political process leading to the nomination or election in the state of political subdivision are not equally open to participation by members of the class citizens protected by subsection (A) of this section in that its members have less opportunity to participate in the process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

STATEMENT OF THE FACTS

The Louisiana Supreme Court is comprised of seven justices, five of which are elected from single-member districts. The two remaining

justices, who terms are staggered, are elected from a multi-member district made up of Orleans, Jefferson, St. Bernard and Plaquemines Parishes. This is known as the First Supreme Court District (hereinafter referred to as the "First District"). Only voters who reside in the First District elect the justices from this district. The candidate who receives the majority of the votes sits on the Supreme Court.

The First District is Louisiana's most populous election district and it contains the most black voters of all of the six Supreme Court Districts. The First District has a majority white population and registered voter majority. Orleans Parish has a black majority in regards

to both total population and registered voter population. Blacks constitute 53% of the registered voters in Orleans Parish, but only 32% of the registered voters in the First District. Race continues to play an important role in judicial elections in Louisiana and the First District. Highly qualified black judicial candidates are unable to successfully seek election for a contested position in Jefferson, St. Bernard and Plaquemines Parishes because the white electorate will not vote for black candidates. Even though blacks do elect their preferred candidates in Orleans Parish-only elections, blacks represent only a minority of elected officials.

Amicus submits that the plaintiffs were successful in establishing the existence of the three elements enumerated by this court in Thornburg vs. Gingles, 478 U.S. 30 (1986). Blacks residing in Orleans Parish make up a group that is sufficiently large and geographically compact to constitute a majority in a single-member district. An Orleans Parish-only district would still be larger than the population size of the Fourth Supreme Court District. A district comprised of Jefferson, St. Bernard and Plaquemines Parishes would be almost equal in size. A new configuration represented by two single-member districts under the aforementioned plan would put to rest the denial and abridgement of the

right to vote of the affected black citizens, who are the voting majority in Orleans Parish. Since black candidates receive a majority of voter support from the black electorate, blacks will have the opportunity to elect their preferred candidate under a revised plan.

The plaintiffs also demonstrate that the white majority vote in the First District acts as a block to defeat the black population's preferred candidate. It was established at trial that the black candidate is the candidate of choice among black voters when black candidates oppose white candidates. White voters on the other hand, do not support black candidate. In the First District no black candidate has ever

been elected in a contested election to parish-wide office in Jefferson, St. Bernard and Plaquemines Parishes. The uncontested testimony at trial clearly shows that white voters will not vote for black judicial candidates. Only within Orleans Parish can a black win election, only because there are sufficient numbers of black voters to overcome white bloc voting.

Factors addressed by the Senate Report for the amendment to Section 2 of the Voting Rights Act are present in this case:

1) Louisiana has a past history of official discrimination cases, which is present today.

2) Racial polorization in the First District voting was clearly established at trial.

3) The opportunity for discrimination against blacks is enhanced because the majority of voting population is white, coupled with a majority vote requirement and staggered terms, effectively eliminates black judicial candidates from seeking elections to the Louisiana Supreme Court.

4) For blacks who live in Louisiana, the disparities in the educational, employment and living conditions effect their ability to participate in the political process.

5) Race plays an important role in the First District judicial elections; white voters will not vote for black candidates.

6) Blacks have enjoyed no success in seeking election for judicial offices in Jefferson, St. Bernard and Plaquemines Parishes. Since the combation white electorate in these parishes constitute a white majority, a black judicial candidate can not expect success in a four-parish election.

The District Court's finding, affirmed by the Fifth Circuit Court of Appeal, concluding that an Orleans-only Supreme Court District was not acceptable and that plaintiffs failed to satisfy all of the Gingles elements is incorrect.

STATEMENT OF THE CASE

COURSE OF PRIOR PROCEEDINGS

Amicus Curiae respectfully adopts the Statement of the Case and descriptions of the prior proceedings contained in the original brief of the plaintiffs-appellants, Ronald Chisom, et al.

ARGUMENT

The Election of Justices for the First District and Its Discrimatory Effect

This case presents an important issue of the meaning of the Voting Rights Act.

Amicus curiae respectfully submits this brief for the sole purpose of suggesting to this Court that the extreme importance of this case effects the makeup of the Louisiana Supreme Court and warrants this appeal. This is a voter discrimination case, brought pursuant to the Voting Rights Act (42 U.S.C. 1973), and the Civil Rights Act (42 U.S.C. 1983), to secure the rights guaranteed by the Fourteenth and Fifteenth Amendments of the United States Constitution. At present, the

multi-parish multi-member district in the First District are unable to elect the candidate of their choice to serve on the Louisiana Supreme Court. The ramifications of this case are such as to impact greatly on the exercise of important voting rights.

This case arises out of a challenge by the plaintiffs, who are voters, attorneys, and voter registration and election organizations, to the multi-member aspect of the scheme by which Louisiana Supreme Court Justices are elected. Plaintiffs contend, and amicus agrees, that the multi-member scheme denies black registered voters an equal opportunity to participate in the political process as it relates to the election of the Supreme Court

Justices because the one, in this instance, of the multi-member scheme dilutes minority voting strength. Louisiana consists of six districts from which members of the Supreme Court are elected. All of these districts, with the exception of the district which is comprised of Orleans, Jefferson, Plaquemines, and St. Bernard Parishes, are designed as to elect a single Supreme Court Justice. The First District elects two Justices, whose terms are staggered. It is the largest Supreme Court District which spans Orleans, Jefferson, Plaquemines and St. Bernard Parishes; and it has the largest black population. More than eighty (80%) percent of the black First District registered voters reside within

Orleans Parish. However, a substantial white majority results in the First District because the four parishes are meshed into one district, from which the entire population elects the two Supreme Court Justices. Amicus suggests that the First District could be split into two Supreme Court Districts, which would be made up of one district covering Orleans Parish and other district comprising of Jefferson, Plaquemines and St. Bernard Parishes.

No black had the opportunity to be elected to the Louisiana Supreme Court from any Supreme Court District in Louisiana in modern times. One Black was appointed to a vacancy on the Court for a period of less than three (3) weeks. But he was not

permitted under the Louisiana Constitution to seek election for which he had be appointed.

Racial Polorization and Its Effect on First District Elections

Historically speaking, Louisiana's judicial elections are racially polarized. Under the composition of the First District, it is not possible for a black to successfully seek a seat on the Supreme Court. The four parish scheme simply creates a white majority who overwhelmingly support white candidates in judicial elections.

The Gingles Factors

Amicus submits that all the elements enunciated by this court in the case of Thornburg vs. Gingles, 478

U.S. 30 (1986) are present. These factors are set out below:

1) The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district.

2) The minority group must be able to show that it is politically cohesive . . .

3) The minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence special circumstances such as a minority candidate running unopposed, . . . usually to defeat the minority's preferred candidate.

In the present case the black minority group is sufficiently large and geographically compact to constitute a majority in a single member district. Blacks comprise more than 50% of the population in Orleans Parish. Within this multi-member

First District, there are concentrations of black citizens that are sufficiently large and contiguous to compromise a voting majority in a single-member district lying wholly within the boundary of the multi-member First District; the present scheme results in a dilution of black votes because the black population is submerged in a white majority.

At trial the facts proved conclusively that the First District black population is politically cohesive. The statistical evidence presented, as well as the testimony of black candidates who stated that they received the majority of electorial support from black voters bore this fact out. Amicus submits that black

support for black candidates in Orleans Parish averages 80%; in Jefferson Parish black support for black candidates averages 90%. A high percentage of black voters regularly support black candidates. The blacks voter in Orleans Parish is is an excellent example of a politically cohesive group.

The black minority group demonstrated that the white majority votes sufficiently as a bloc results to defeat of the minority's preferred candidate. At trial, it was established that the black candidate was the candidate of choice by the black voters when a black candidate opposed the white candidate in any race. White voters, however, always fail to cast a majority of their votes

for any black candidate who opposes a white candidate.

It was clear at trial that white voters will not vote for black judicial candidates, regardless of their qualifications. It was found that only within Orleans Parish where black voters represent the voting majority are the black voters able to overcome the white bloc to elect a candidate of their choice. While blacks serve as judges in Orleans Parish, no black candidate has been elected in a contested election to a parish-wide office in Jefferson, St. Bernard or Plaquemines Parishes. It is impossible for a black candidate in the First District to successfully seek election to the Louisiana Supreme Court.

The History of Past Discrimination in Louisiana

Louisiana has a long history of official discrimination bearing upon the right to vote. This circumstance was acknowledged by the trial court. This history of discrimination has been the subject of continual litigation. The evidence at trial clearly displayed that this illegal voting discrimination in Louisiana goes on, even at present. Major vs. Treen, 574 F. Supp. 325 (E.D. La. 1983); East Jefferson Collision for Leadership and Development vs. Jefferson Parish, 691 F. Supp. 991 (E.D. La. 1988); and Citizens for a Better Gretna vs. City of Gretna, 834 F. 2d 496, 499 (5th Cir. 1987), cert. den. 106 L. Ed 2d 564 (1989). The

history against blacks in Louisiana is further evidenced by the fact that black students were not permitted to attend law schools in Louisiana until recent years a very large percentage of the State's black law student population attends the law school at Southern University, whereas most ofthe white public law students attend Louisiana State University, an academically superior institution. In regards to this point, the lower court had concluded that "the relatively lower economic status of black residents further affects accessibility to better education and such praticalities as campaign funding". As compared with whites, one-half fewer black persons in the First District have a high school education

and these blacks have one-half the per capita income of white. Additionally, there are five times as many black families living below the poverty level. The disparity is evident. The court in United States vs. State of Louisiana, 692 F. Supp. 642 (E.D. La. 1988) found that Louisiana higher public education still operates as a dual system.

Section Two of the Voting Rights Act Includes Judicial Elections

Nothing in the Voting Rights Act indicates that Congress intended to exclude the judiciary from the word "representatives" in Section Two of the Act. It is clear that the use of a multi-member electorate structure operates to minimize blacks preferred

candidates. In Louisiana, blacks do not have full access to the political process as it relates to the election of judicial candidates in the First District. At present, black voters in the First District have the opportunity to choose only among candidates offered by the white community. It is clear that the Voting Rights Act contemplates providing the black population with an equal opportunity to vote for judicial candidates of their choice. The defendants presented no evidence at trial that races where white candidates opposed each other offered black voters a choice of a "viable minority candidate".

In the present case, the use of larger multi-member First District is the direct cause of the dilution of black voting strength. Amicus submits that if the First District is divided into two smaller districts, blacks will have the ability to elect a black candidate. This scenario is simply not possible under the present system because blacks do not have the potential to elect their candidates within the present larger predominately white district.

The Decision of the Fifth Circuit Conflicts with the Sixth Circuit's Decision in Mallory vs. Eyrich

The Mallory vs. Eyrich, 839 F. 2d 275 (6th Cir. 1988) case involved the challenge of the election of the Ohio Municipal Court Judges. Here

the Sixth Circuit concluded that the Section 2 applied to the election of Judges.

The Mallory court scrutinized the language of the original Section Two of the Voting Rights Act in relation to the word "representatives" and found that no exceptions were expressed or implied. The Voting Rights Act of 1965 included a blanket prohibition against race-based discrimination in voting. The act defined "vote" or "voting" as including "all actions necessary to make a vote effective in any primary, special or general election, ... with respect to candidates for public or a party office ...". Congress did not change Section 14 (B) or the operative

provisions of this statute that define the scope of the Voting Rights Act when the language was added. Additionally, the court concluded that the 1965 act defined the term "vote" and "voting" very broadly and that judicial candidates are "unquestionably candidates for public . . . office".

In its decision, the Mallory court rejected the reasoning relied upon by the Fifth Circuit. In two respects, Mallory concluded that there is "no basis in the language or Legislative history of the 1982 amendment to support the holding" that when it used the word "representative" in the 1982 amendment, Congress removed Judicial Elections from the protective measures of the Act. There

is no reason to conclude that Congress intentionally created such an exception. The Mallory opinion makes it clear that the 1982 amendment to the Voting Rights Act did not "diminish the reach or effect of the original Section Two in any way". Amicus agrees that the word "representatives" should not be restrictivly interpreted and that the lower courts were in error for doing so. If it was seeking to limit the application of the Voting Rights Act to legislative races, Congress could have chosen the word "legislators", instead of "representatives". At present, there is absolutely no evidence that Congress intended to remove judicial elections from the

protection of the Voting Rights Act as it appears that the Act applies to all voting without any limitation.

CONCLUSION

The districting scheme presently in place in the First Distirct has the effect of unconstitutionally diluting the black vote in the parishes of Orleans, Jefferson, St. Bernard and Plaquemines. It is clear that voting in the First District is racially polorized, which effectively precludes a black candidate for the Louisiana Supreme Court to successfully seek a position as justice on the High Court. Amicus asserts that plaintiffs were overwhelmingly successful in showing existence of the Gingles factors, and as such that the current

districting arrangement is discriminatory within the provisions of Section Two of the Voting Rights Act. As a group, white voters simply will not vote for black judicial candidates in the First Supreme Court District. For the foregoing reasons, the decision of the Fifth Circuit should be reversed and the case should be remanded for a decision on the merits of the petitioners claims under Section Two of the Voting Rights Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of February 1991 served a copy of the foregoing on the counsel of record via the United States Postal Service, properly addressed, and postage prepaid.

DARLEEN M. JACOBS

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Nos. 90-757 & 90-1032

In the
Supreme Court of the United States
October Term, 1990

RONALD CHISOM, et al.,
Petitioners,

v.

CHARLES E. ROEMER, et al.,
Respondents.

Consolidated with

UNITED STATES,
Petitioners,

v.

CHARLES E. ROEMER, et al.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE SUPREME COURT JUSTICE FOR ORLEANS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Supreme Court Justice for Orleans, Inc., is a non-profit public interest corporation organized under the laws of the State of Louisiana and domiciled in Orleans Parish, Louisiana. The corporation's purpose is to engage in non-partisan activities to change the electoral laws of Louisiana in order to provide for a supreme court district comprised solely of Orleans Parish, a parish in which African-American voters are in the majority.

Supreme Court Justice for Orleans, Inc., has pursued its purpose through voter education activities, supporting state legislation designed to change the

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[1] All parties in both No. 90-757 and No. 90-1032 have consented to participation by amicus. Copies of their letters accompany this brief, pursuant to Rule 37.3 of the Rules of this Court.

method of electing state supreme court justices, and participating in amicus curiae briefs on behalf of parties litigant in voting rights cases who seek relief consistent with the purpose of the corporation. This case, therefore, involves a matter of direct organizational interest to amicus.

SUMMARY OF ARGUMENT

These consolidated cases are before this Court because the court of appeals (in another case) incorrectly read the term "representative" too narrowly and, thereby, concluded that judicial elections are not covered by § 2 of the Voting Rights Act. As a result, that court foreclosed the panel considering these cases from determining whether the election districts for the Louisiana Supreme Court violate § 2.

This amicus brief will address in detail the various rationales for reading the term "representative" more broadly. These rationales include the plain meaning (both common sense usage and technical meaning) of the term, application of maxims of statutory interpretation, and the historical development of the tradition of electing state judges as "representatives."

In addition, this brief attempts to place the instant cases in perspective by detailing Louisiana's history of official and unofficial discriminatory practices, and the appropriate remedy for the racial vote dilution shown in these cases.

ARGUMENT

I. JUDGES ARE "REPRESENTATIVES".

This case is before this Court because the Court of Appeals for the

Fifth Circuit, sitting en banc, overruled the two-year-old precedent of Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), holding that § 2 of the Voting Rights Act does not apply to judicial elections. See LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990), cert. granted sub nom. Houston Law. Ass'n v. Attorney Gen., 59 U.S.L.W. 3500 (U.S. Jan. 18, 1991) (Nos. 90-813, 90-974). The LULAC majority summarized its conclusion about the coverage of § 2 as follows: "Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of representatives only." LULAC, 914 F.2d at 622 (emphasis in original). That conclusion, which crafts a judicial exception to the otherwise

broad coverage of § 2, was premised upon the belief that the judiciary serves "no representative function" and "represents no one." Id. at 625. These broad statements ignore the ordinary and technical usage of the term "representative," as well as the structure and legislative history of the Voting Rights Act and its amendments. The court of appeals' statements also overlook the historical development of the tradition of state judicial elections in this country and disregard the close connections among judicial elections, representative government, and public accountability.

The LULAC majority below did not employ the correct methodology for interpreting § 2. Instead, the plain meaning of the statutory term

"representative" should have been determined

> on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated. . . .

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment)(emphasis added).

The court of appeals did neither. First, it did not read "representative" in accordance with its ordinary usage. That court bypassed the broad range of roles encompassed within the plain meaning of "representative," seizing instead upon the most cramped sense of the term. Second, the LULAC majority failed to read "representative" in a

manner compatible with the other provisions of the Act and its expansive 1982 Amendments. As a result, the LULAC majority crafted an exemption to the broad coverage of the Act for elected judges. Proper statutory interpretation demonstrates that that exemption was not enacted by Congress, but was, instead, developed only by the court of appeals itself.

A. Both the Ordinary Usage of "Representative," and the Technical Meaning of This Political Term Dictate a Broad Reading.

The term "representative" has a wide variety of meanings, which easily encompass the duties of an elected judge. The LULAC majority was, therefore, incorrect in its assumption that Congress intended to use that term to limit the coverage of § 2 to legislators and executives only.

1. Ordinary Usage as Reflected in Dictionary Definitions

Webster's Dictionary provides the following diverse meanings in its first set of definitions for "representative":

> **1** : serving to represent, portray, or typify: characterized by representation . . . **2** : standing for or in the place of another: acting for another or others: constituting the agent for another esp. through delegated authority **3** : of, based upon, or constituting a form of government in which the many are represented by persons chosen from among them usu[ally] by elections. . . .

WEBSTER'S THIRD NEW INTERNAT'L DICTIONARY 1926 (1986) (emphasis added).[2] All three of these meanings,

[2] Only in the second set of definitions is there a meaning even approaching the court of appeals' narrow reading: "one who represents a constituency as a member of a legislative or other governing body." WEBSTER'S, supra, at 1926 (emphasis added). Even this definition includes elected representatives in governmental bodies other than legislatures, e.g. courts.

and especially the third, easily include judges.

2. Technical and Professional Meanings

The term "representative" has been widely debated by political scientists. See generally H. PITKIN, THE CONCEPT OF REPRESENTATION (1972). For example, A. H. Birch identifies three technical usages of this term which parallel the common usages quoted above: "1. to denote an agent or spokesman who acts on behalf of his principal; 2. to indicate that a person shares some of the characteristics of a class of person; 3. to indicate that a person symbolizes the identity or qualities of a class of persons." A.H. BIRCH, REPRESENTATION 15

(1971).[3]

3. The Definition Employed by the Court of Appeals is Much Narrower Than the Common and Technical Usages.

The court of appeals described § 2 representatives very narrowly as those who "synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues." LULAC, 914 F.2d at 625. That court then contrasted this narrow definition with what it viewed as the judicial function of resolving disputes about the law, which might include ruling that a popular law is unconstitutional. Id. at 626.

[3] Similarly, Black's Law Dictionary defines "representative" as a "person or thing that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent to, another person or thing." See BLACK'S LAW DICTIONARY 1302 (6th edn. 1990).

The court of appeals' approach to representation is too narrow because it ignores the multifaceted understanding of the term "representative" within the professional community. Indeed, political scientists have warned against focusing upon only representatives who act "on behalf of a group." Such a narrow view overlooks the crucial fact that the

> representative's actions are also accepted by these individuals as authoritative. In fact Weber goes so far as to write that 'the primary fact underlying representation is that the action of certain members of a group, the "representatives," is binding on the others or is looked upon as legitimate so that its result must be accepted by them.'

Nordlinger, Representation, Stability, and Decisional Effectiveness, in REPRESENTATION (NOMOS X) 109-10 (J.R. Pennock & J. Chapman eds. 1968)

(emphasis in original). See also PITKIN, supra, at 4-5 (contrasting views of Hobbes and later political theorists regarding the extent of a representative's independence, and warning against reading "any one of them in isolation"); Pitkin, Commentary: Paradox of Representation, in Pennock & Chapman, supra, at 38 (describing the need for a "detailed dissection" of "a concept as complex as representation").

Even taking the court of appeals' specific example of one aspect of judicial activity, political scientists observe that all representatives must, at times, make decisions contrary to the public will. "[A] democratic government must be accorded a sufficiently wide scope of independent authority by the electorate so that when conditions and events demand it, decisions can be taken

without first having to consider public opinion, and perhaps even taking actions that are distinctly unpopular among the voters." Nordlinger, supra, at 110. See also BIRCH, supra, at 48 (representatives derive their legitimacy from elections, but "have no obligation to take instructions from their electors").[4] Thus, all representatives should, and do, have some independence from the voters.

Though elected judges may be somewhat further along the spectrum of

[4] This view that even a legislative representative should have general independence from the voters can be traced to Edmund Burke's classic "Speech to the Electors of Bristol," in November 1774, where he observed "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . [G]overnment and legislation are matters of reason and judgment, and not of inclination. . . ." BURKE'S POLITICS 115 (R. Hoffman & P. Levack eds. 1967).

independence (in terms of response to immediate voter concerns) than legislators, both are elected representatives. That is, both are representatives within the common and technical usages of that term, because they are elected as the voters' choice of the type of individual the voters desire to have exercise power on their behalf -- legislative power in the one case and adjudicative power in the other. That, after all, is the focus of the Voting Rights Act -- the voter's rights, not the duties performed by the person for whom they vote. Cf. Board of Estimate v. Morris, 489 U.S. 688, 698 (1989).

Moreover, judges do inherently "represent" (in the sense of "typify") persons with similar backgrounds. See generally Comment, A Judicial Exception

for Judicial Elections: "A Burning Scar On the Flesh of the Voting Rights Act," 65 Tul. L. Rev. part III.D (forthcoming 1991). In particular, judges bring their own character and background to the bench which, in turn, influence their interpretation of the law. Id. As Justice Holmes aptly noted:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O.W. HOLMES, THE COMMON LAW 1 (1881). See also B. CARDOZO, THE NATURE OF THE

JUDICIAL PROCESS 12-13 (1921).[5]

B. This Court Should Read the Terms Contained in the Voting Rights Act Broadly in Light of the Other Provisions, Legislative History, and Broad Purposes of the Act.

Instead of excising a single word from one subsection of the Voting Rights Act, and then choosing the most restrictive definition, as the LULAC majority did, this Court should examine the term "representative" within the overall context of the Act. That examination will demonstrate that "representative" does not appear where one would expect the Act's coverage to be defined or limited, such as a definitional section. Rather, Congress

[5] See also Harper, Integrate the Federal Bench, N.Y. Times, Feb. 22, 1991, at A17, col. 3 (nat'l ed.) (Pres. of Ass'n of the Bar of the City of N. Y. arguing that the federal "bench should reflect the diversity of our population").

utilized it in § 2(b) as an illustration of proof of a violation of § 2(a). See Thornburg v. Gingles, 478 U.S. 30, 43 (1986). Thus, to say that § 2(b) limits the coverage of § 2(a) is to say that a single example of a violation controls the entire section. This Court has held to the contrary. Gingles, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").

In particular, the election of a judge, for purposes of the Act, is no different from the election of any other public official. Thus, this Court should look to the true coverage section of the Act, § 14(c)(1), to see that elected judges are "candidates for public or party office," and, therefore, encompassed within the express terms of § 2 of the Voting Rights Act. LULAC,

914 F.2d at 654 (Johnson, J., dissenting).

A reading of § 2 which includes judges is consistent with the established interpretation that § 5 of the Act covers judicial elections. See Georgia State Bd. of Elections v. Brooks, No. Civ. A. CV288-146 (S.D. Ga. Dec. 1, 1989, aff'd, 111 S.Ct. 288 (1990).

The Voting Rights Act of 1965 and its amendments were designed to "rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966). Courts should broadly construe such a remedial statute, especially one with the expansive structure and purpose of the Voting Rights Act. See Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969) ("the broadest possible scope").

Moreover, "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). The court of appeals' strained reading of the statute falls far short of these standards for statutory interpretation, and, thereby, frustrates the will of Congress evidenced by the structure and context of the Voting Rights Act.

Furthermore, the legislative history and background to the original Voting Rights Act of 1965 and its amendments support this broader reading of the term within this remedial act. See LULAC, 914 F.2d at 653-54 (Johnson, J., dissenting). That legislative history is detailed in Brief for

Petitioners Chisom, et al., at parts I, II.[6]

C. Principles of Federalism Also Support a Broad Reading of the Act.

Instead of taking account of this statutory context, purpose, and legislative history and background, the court of appeals inappropriately questioned the very practice of judicial elections, opining: "These offices are not 'representative' ones, and their occupants are not representatives," and adding "the state processes for filling them need not even be elective." LULAC, 914 F.2d at 631. But some states have,

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[6] One of the most telling portions of that history is Senator Orrin Hatch's statement that § 2 would cover elections in "all governmental units, including . . . judicial districts." S. Rep. No. 417, 97th Cong., 2d Sess. 151, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 323 ["Senate Report"].

in fact, chosen to elect their judges by a popular vote.

Therefore, the question before this Court is not whether the popular election of judges is desirable, as our system of federalism permits states to make that decision. Instead, the issue is whether Congress viewed this practice as similar to the election of other public offices and thus deserving of Voting Rights Act protection. See Comment, supra, at part III.D. Indeed, in Louisiana and many other states, voters elect a variety of quasi-judicial officers -- district attorneys, clerks of court, sheriffs, coroners. See generally Imbler v. Pachtman, 424 U.S. 409, 430 (1976). All these quasi-judicial officials are covered by §2, even though all of them, like judges, must be both representative and

impartial. Hence, the court of appeals is simply incorrect in its belief that "judicial offices and judicial selection processes are sui generis in our nation's political system." LULAC, 914 F.2d at 631. See also Brief for Petitioners Chisom, et al., at part IV. (discussing "representativeness" of judges and jurors).

> As Chief Justice Burger observed:
>
> States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters . . . . However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

Kramer v. Union Free School Dist., 395 U.S. 621, 629 (1969), quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663,

665 (1966). Cf. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 229-30, 231 (1964) (public school system need not be established, but once it is, it must be administered in a non-discriminatory manner).

Similarly, "when a state decides that its trial judges are to be popularly elected, as Florida has done, it must recognize the candidates' right to make campaign speeches and the concomitant right of the public to be informed about judicial candidates." ACLU v. The Florida Bar, 744 F.Supp. 1094, 1097 (N.D. Fla. 1990). Based on this reasoning, that court enjoined enforcement of Fla. Jud. Canon of Conduct 7(B)(1), which proscribed discussion by judicial candidates of disputed legal or political issues. The court, thereby, recognized the

similarity between judicial campaigns and campaigns for other elective offices. See generally Hall, Constituent Influence in State Supreme Courts, 49 J. Pol. 1117 (1987).

In sum, by denying judicial elections the protection Congress intended under § 2 of the Voting Rights Act, the LULAC majority turned a deaf ear to the ordinary and the technical usages of the term "representative," the broad remedial purposes of the Voting Rights Act, and the legislative history of the Act. The majority also ignored the critically important American tradition of electing state judges as representatives of the people.

D. America's History of Elected State Judges Shows That They are Considered Representatives of the People.

In concluding that elected state judges could not be viewed as representatives, the LULAC majority closed its eyes to the historical reasons for instituting state judicial elections in the first place -- to ensure representative government and accountability to the people. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 126-27 (2d ed. 1985); E. HAYNES, THE SELECTION AND TENURE OF JUDGES 184 (1944); Dubois, Accountability, Independence, and the Selection of State Judges, 40 Sw.L.J. 31, 34-35 (1986); Champagne, The Selection and Retention of Judges in Texas, 40 Sw.L.J. 53, 111 (1986); Hall, The "Route to Hell" Retraced: The Impact of Popular Election

on the Southern Appellate Judiciary, 1832-1920, in THE AMBIVALENT LEGACY 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984).

1. The Tradition of State Judicial Elections in America

The practice of electing judges developed in the United States as part of the broad-based Jacksonian democracy movement that swept the United States during the mid-nineteenth century, but this movement had even deeper roots. The Jacksonian push for more representative government on all levels and all offices (including judges) was actually "one phase of the general swing toward broadened suffrage and broader popular control of public office which Jacksonian Democracy built on the foundations laid by Jefferson." J.W.

HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 140 (1950).

As many scholars have observed, the general population was disenchanted with the unrepresentative character of the new government after the American Revolution. As a leading Southern historian recounts: "Much criticism arose because the people had not been given more voice in [the] adoption and promulgation" of state constitutions adopted in 1776. F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 101 (1971).

The economic "transformation" of the country after the Constitutional Convention of 1789 led to calls for a more representative system of government, including "the extension of suffrage, the establishment of public

schools, the equitable apportionment of representation, internal improvements, the use of public credit, an elective judiciary, the limitation of the powers of the legislature, the regulation of corporations, and others of similar nature." GREEN, supra, at 161-62 (emphasis added). See also Nye, The Young Republic, in L. WRIGHT, et al., THE DEMOCRATIC EXPERIENCE 85 (1963). That is, reforms and expansion of the suffrage were closely linked to the trend toward election of the state judiciary. Even Thomas Jefferson criticized the nature of suffrage and representation in the Virginia constitution, and suggested numerous amendments including "(4) Judges elected or amovable. (5) Justices, jurors, and sheriffs elective." GREEN, supra, at

175, quoting NILES' REGISTER 179 (Letter of Apr. 19, 1824).

Throughout the South during this period, the judiciary was attacked as too aristocratic, monarchical, and beyond popular control. In a House speech, W.B. Giles of Virginia condemned the judiciary as a "scion" of the executive set apart for convenience only. In North Carolina, there were calls to make the courts more responsive to the people through elections and shorter terms. Georgia reformers in 1819 advocated the creation of a popularly elected Georgia Supreme Court. See GREEN, supra, at 189-90.

Even judges began to view themselves as lawmakers. Professor Horwitz attributes this attitude to the perception by jurists that the common law was an instrument of will. He adds

that the behavior of judges reflected the view "that they had been given a popular charter to mold legal doctrine according to broad conceptions of public policy." M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 22-23 (1977). He quotes two prominent jurists of the period: "'Theoretical[ly] courts make no law', they declared, 'but in point of fact they are legislators'." Id.

In his first inaugural address to Congress in December 1829, President Jackson called for an expansion of representativeness in public offices:

> The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance. . . . In a country where offices are created solely for the benefit of the people no one man has

> any more intrinsic right to official station than another.

Quoted in R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 50 (1970) (emphasis added). This Jacksonian theme of offices becoming more open to a wider range of persons overlaps the dictionary definitional focus upon a representative as "typical" of a class of persons. See Part I.A.1., above. See also Pitkin, supra, at 38-39.

The call for greater openness in representation permeated all levels of public office and led to major changes in the state constitutions. The general population, long disenchanted with concentrations of power, demanded more control over and accountability from all of their public officials, including

judges.[7]

Making courts more accessible to the public was rooted in the "existing chaos of statutes and common law," which were believed to generate unaccountable "discretionary" power in the courts, thereby creating in effect a "legal and judicial aristocracy." A. SCHLESINGER, THE AGE OF JACKSON 329-30 (1945). See also GREEN, supra, at 189; Robinson, A Program for Labor, in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 320 (J. Blau ed. 1947). A "factor of some consequence in

[7] As the Albany Patriot newspaper explained:

> The people will demand that the next legislature shall either pass a law resigning the election of judges into the hands of the people from whom they have in part usurped the authority, or, that they shall provide for submitting it to them to be decided at the ballot box.

GREEN, supra at 260, quoting The New Constitution 63 (1849).

the movement to bring the judges under popular control, seems to have been the idea that American judges, much more than judges generally, were invested with legislative functions." HAYNES, supra, at 95.

This increasing pressure for change led many states to switch from appointment to popular election of judges. Georgia elected the first lower court judges in 1812, while Mississippi, in 1832, was the first state to adopt a completely elective judiciary. New York, in its 1846 Constitutional Convention, switched from legislative and gubernatorial appointment to election. In 1850, seven states adopted laws that provided for more popular election of judges. See FRIEDMAN, supra, at 371.

As might be expected in a federal system, some states have gone back and forth, experimenting with appointive, elective, and mixed schemes. For example, during Reconstruction, some Southern states briefly returned to the appointive system. FRIEDMAN, supra, at 371. See also Champagne, supra, at 55 (In Texas, judges were gubernatorial appointees until Jacksonian influences led to judicial elections in 1850; gubernatorial appointment was reinstated briefly during Reconstruction; the state returned to elections in 1876.).

2. The History of Judicial Elections in Louisiana.

Louisiana was no exception to the nineteenth century movement toward judicial elections. One delegate to the 1844 Louisiana Constitutional Convention

epitomized this desire to achieve public accountability by the courts: "[M]y colleagues and myself have been instructed by a voice that will admit of no excuse, to enter the great judicial tabernacle and make it accessible to the people. They want to know their priest -- they want a voice in his promotion." Proceedings and Debates of the Convention of Louisiana, Jan. 14, 1845, at 741. He carefully described the goal of treating elected judges as public representatives in a manner that refutes the ahistorical approach taken by the LULAC majority:

> But the necessity of electing judges becomes absolutely imperative, in our minds, when we approach the consideration of the functions they fulfill. Judges not only decide controversies between individuals, but they interpret and construe the constitution and laws. The same constitution, when looked

> upon by a democratic and an aristocratic eye presents very different appearances.

Id. at 743 (emphasis added). He added: "That such a power as this should be placed beyond the controlling influence of public opinion . . . and public virtue, is clearly incompatible with free government." Id.

By 1852, when the next Louisiana Constitutional Convention adjourned, there was substantial support for making the judiciary more representative of the people through elections. Indeed, the principal criticism of the proposals was that the terms for the elected judges were too long for them to be "accountable" to the people:

> One thing it proposed was to elect the Chief Justice for ten years! . . . It was in effect, a judiciary of life tenure . . . . The fact was, that the majority of the Convention intended by this provision, to destroy the

> principle of an elective judiciary, for the object of the system was to hold the Bench accountable to the people. . . .

New Orleans Daily True Delta, Oct. 27, 1852, at 2 (Speech of Col. Flucker) (emphasis added).

In 1920, the Louisiana Bar Association appointed a special committee to make recommendations on the "Judiciary" article for the Constitutional Convention of 1921. The committee's report described an elective system as making judges "directly and immediately responsible to the people, and subject to popular approval and reproof." Report of the Special Committee on Judiciary Ordinances of the New Constitution (Feb. 1920), reprinted in 1 LA. STATE LAW INST., PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA

WITH NOTES AND STUDIES 1035, 1042 (1954) ["PROJET"]. [introduced as Government Ex. 27 at trial in case No. 90-1032]

Indeed, the Report recommended that new judicial election districts be added by the 1921 Constitution, and it announced in clear terms: "Each justice and judge now in office shall be considered a representative of the judicial district within which is situated the parish of his residence at the time of his election." PROJET, supra, at 1039 (emphasis added).

3. Judicial Accountability and Judicial Independence

In describing the differences between the federal appointive model and the general state elective model, Philip Dubois, oft-cited historian of the judicial election process, observes: "[T]here has been great disagreement on

how best to accommodate these conflicting values of judicial independence and judicial accountability in the selection and retention of judges." Dubois, supra, at 34.

He explains that some commentators "would place the emphasis upon accountability, with judges initially selected by popular election and subject to popular review after relatively short terms in office." Id. at 35. On the other hand, opponents of judicial elections, like the LULAC majority, have expressed concern that public accountability was achieved at the cost of judicial independence. See generally Comment, supra, at part III.C n.134 (collecting sources in the debate). Lawrence Friedman offers a balanced assessment:

> In the long run, the elective system did not have results so earthshaking, for good or bad, as proponents had hoped and opponents had feared . . . . Some lawyers had warned of the grave danger to the polity that might come from making judges run for offices; hostile politicians would grub about in the reports, find an unpopular decision, and use it politically to ruin a sitting judge. But as it turned out, most sitting judges who ran again won again, regardless of party.

FRIEDMAN, supra, at 371-72. See also Champagne, supra, at 111. Indeed, even an author who disapproves of judicial elections acknowledges that they are

> still in use in a majority of states and tenaciously clung to by many people. Their demand for elected judges, like their demand for jury trial, is a manifestation of a deep-rooted determination among free people to keep in their own hands control over the process whereby their lives, liberties, and properties are disposed.

Winters, Judicial Selection and Tenure, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 27, 32 (G. Winters ed. 1967).

As this historical discussion reflects, several states, including Louisiana, have opted for political accountability by their elected judicial representatives. Therefore, the LULAC majority should not have questioned the wisdom of those decisions. Instead, it should have enforced Congress' clearly expressed intention to subject those elections to the fairness requirements of § 2 of the Voting Rights Act.

II. LOUISIANA'S HISTORY OF OFFICIAL DISCRIMINATION ENGENDERED EFFECTS WHICH CONTINUE TODAY.

Both historians and courts have documented Louisiana's long, sad history of racial discrimination and political disenfranchisement. The panel in Chisom

did not have the opportunity to render judgment on the three Gingles factors or the Senate factors in this § 2 case, because the en banc court, in LULAC, ruled that judicial elections are not covered. A brief look at Louisiana's history, however, places the matter in perspective.

A. History Behind Louisiana's 1898 Constitution

Louisiana's current districts for electing state supreme court justices have direct historical antecedents in the Louisiana Constitution of 1898, regarded by historians and by this Court as a tool for the disenfranchisement of African Americans. See, e.g., Louisiana v. United States, 380 U.S. 145, 147 (1965) ("[B]eginning with [that Constitution, Louisiana] put into effect a successful policy of denying Negro

citizens the right to vote because of their race."); W.J. HAIR, BOURBONISM & AGRARIAN PROTEST: LOUISIANA POLITICS, 1877-1900, at 276 (1969); Plaintiffs' Exhibit ["Pl. Ex."] 3, at 2-3 (Dr. Cassimere's Rpt.). See also Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113, 1117 (E.D. La. 1986), aff'd, 834 F.2d 496 (5th Cir. 1987), cert. denied, 109 S.Ct. 3213 (1989).

The 1898 Constitution was part of the general movement to eviscerate the effects of the post-Civil War Amendments. Like other constitutions and statutes passed in the South during the 1890s, it contained provisions to disenfranchise African Americans. See generally Hunter v. Underwood, 471 U.S. 222, 229 (1985).

The 1898 Constitution contained a

provision known as the "grandfather clause," which imposed burdensome requirements for voter registration, but exempted those persons who had been entitled to vote before January 1, 1867. This clause, declared unconstitutional in Guinn v. United States, 238 U.S. 347 (1915), was later called "a transparent expedient for disfranchising Negroes, whose ancestors had . . . not [been] entitled to vote in Louisiana before 1867." Louisiana, 380 U.S. at 148. See generally Pl. Ex. 3, at 2. These ingenious devices were especially effective in denying African-American suffrage. J.G. TAYLOR, LOUISIANA RECONSTRUCTED 1863-1879, at 483-84

(1974).[8] See also Stipulations ["Stip."] Nos. 36, 38 (detailing a decline in registered African Americans from 126,846 in 1896 to only 5,320 in 1900).

Encouraged by this Court's ruling in Guinn, African Americans petitioned the 1921 Constitutional Convention to expand the franchise. The delegates' reaction to this "delicate question" was to move all discussion of suffrage into executive session as they preferred "'not to debate it in the open'." A former Governor proposed, in lieu of the grandfather clause, that the suffrage

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[8] Even moderate policies of appointing African Americans to office was often mere window dressing. As Gov. Francis T. Nicholls of Louisiana said "'[I] appointed a number of [African Americans] to small offices sandwiching them on Boards between white men where . . . they were powerless to do harm'." HAIR, supra, at 22.

should be limited to the descendants of those persons who inhabited the earth north of the twentieth degree of north latitude prior to October 12, 1492, when Columbus discovered America. PROJET, supra, at 485 & n.119.

The outcome of the closed session was an "interpretation" test. It required a registration applicant to "'give a reasonable interpretation' of any section of the the state or federal constitution as a prerequisite to voter registration." Stip. No. 40. See La. Const. (1921) art. VIII, § 5(7).

Louisiana also enacted the so-called "white primary" which denied African Americans the right to participate in Democratic Party primaries. Pl. Ex. 3, at 2; Stip. No. 39. Because of the "solid" South's exclusive commitment to that Party, this

racially exclusive primary effectively prevented African Americans from having any meaningful participation in the electoral process. See generally Hackney, A Giant Step Backward: The Negro and Disenfranchisement, in 2 THE GROWTH OF AMERICAN POLITICS 213-14, 223-25 (F. Gatell, et al., eds. 1972). Such provisions were declared unconstitutional by this Court in Smith v. Allwright, 321 U.S. 649 (1944). After invalidation of the white primary, Louisiana instituted "citizenship" tests and an anti-single-shot provision, and the Democratic Party adopted a majority vote requirement. Stip. No. 42. The State also made greater use of the interpretation test provision described above, until it too was invalidated in 1965 in Louisiana, 380 U.S. at 152-53.

See generally Gretna, 636 F.Supp. at 1117.

The same 1898 Constitution that initiated these repeated attempts at disenfranchisement also instituted the peculiar system by which Justices to the Louisiana Supreme Court are still elected. Compare La. Const. (1879), art. 83 with La. Const. (1898), art. 87. The 1879 Constitution had set forth a five-member Court, with the Chief Justice elected from the state on an at-large basis, and the remaining four Justices elected from four judicial districts. By contrast, the 1898 Constitution provided for the election of one Justice from each of three judicial districts and the election of two Justices from the district which encompasses New Orleans and its suburban parishes (the most populous section of

the state). This same basic arrangement is still employed for the election of the Louisiana Supreme Court today. See La. Rev. Stat. Ann. § 13:101 (West 1983); Part III, below.

Recently, in Gretna, the district court rendered detailed findings of racial discrimination in and around the City of Gretna, a suburb of the New Orleans and the parish seat of one of the white-majority parishes (Jefferson) included in the Louisiana Supreme Court district challenged here. The district court described the history of discrimination and its continuing effects in Louisiana and Jefferson Parish. 636 F.Supp. at 1116. See also Gretna, 834 F.2d at 499. The court recounted the testimony of witnesses, detailing the "grinding details of everyday life" for African Americans.

636 F.Supp. at 1117 n.8. These findings of fact, coupled with the findings about history and stipulations in the instant cases are probative in determining whether the electoral system challenged in this case would exist but for the racial animus behind the 1898 Constitution. They are also important in considering the implications of continuing that system under current demographic and social conditions. See generally Hunter v. Underwood, 471 U.S. 220 (1985). In Hunter, this Court invalidated an Alabama constitutional provision that denied the right to vote to anyone convicted of crimes of "moral turpitude." This Court carefully reviewed the fact that the provision was first enacted as part of the 1901 Alabama Constitution which, like Louisiana's 1898 Constitution, was

adopted for the primary purpose of disenfranchising African Americans. This Court then analyzed the discriminatory impact of the provision in light of subsequent developments and the state's inadequate justification for continuing the provision. Id.

B. Continuing Effects of Past Discrimination

The discriminatory conditions described by historians, this Court, and numerous lower courts were all part of a conscious attempt, beginning with the 1898 Constitution, to deny Louisiana's African Americans their right to vote. This policy has had effects lasting until today.

The actual result of this history of racial discrimination is the severe depression of income levels, education, and employment for Louisiana's African

Americans; to this day, this depression impedes their effective participation in the political process. Gretna, 636 F.Supp. at 1120. Stipulations Nos. 101 through 109 attest to the same substantial economic disparity. Plaintiff's expert, Dr. Richard Engstrom, reported the vast socio-economic disparity between whites and African Americans which exists today. Pl. Ex. 1 and 3.

Judge Revius D. Ortique, Jr.'s testimony was particularly revealing. Judge Ortique testified that he, an African-American Orleans Parish Civil District Court judge, was compelled to arrange special sheriff's protection for himself and his staff when his court held a special session in neighboring, majority white Plaquemines Parish. Transcript [Tr.] 25. Judge Ortique's

testimony also noted that the most successful manner in which African Americans had reached the Orleans Parish bench (through appointment to a vacant position and candidacy as an incumbent) had been removed by the 1974 Constitution. Tr. 32.

Other witnesses also testified to the lingering effects of Louisiana's discriminatory history. Plaintiff's historical expert, Professor Raphael Cassimere, recounted some of the history detailed in part II.A., above, and then testified of official acts of racial discrimination which still occur in Louisiana. For example, Louisiana's 1984 Presidential primary was cancelled after Jesse Jackson announced his candidacy. Only through Justice Department intervention was the primary held, see Pl. Ex. 3; Jackson won the

Louisiana primary. Also, the State Department of Transportation settled with the Justice Department a case with evidence of the State's failure to promote African-American civil service workers. Tr. 130.

Indeed, the federal court dockets have been filled with other voting rights litigation from the very parishes which make up the Louisiana Supreme Court's First District. See, e.g., Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113 (E.D. La. 1986), aff'd, 834 F.2d 496 (5th Cir. 1987) (City's at-large electoral system violates § 2), cert. denied, 109 S.Ct. 3213 (1989); Major v. Treen, 574 F.Supp. 325 (E.D. La. 1983) (Congressional districts in greater New Orleans area violate § 2); East Jefferson Coalition for Leadership and Development v. Parish

of Jefferson, 691 F.Supp. 991 (E.D. La. 1988) (Parish Council election system violates § 2), appeals docketed, Nos. 89-3486, 90-3456 (5th Cir. 1990); Fifth Ward Precinct 1A Coalition and Progressive Ass'n v. Jefferson Parish School Board, 1989 WL 3801, No. 86-2963 (E.D. La. 1989) (settlement of § 2 case resulting in first elected African-American member of Parish school board).

Additionally, governmental entities in the area are subject to the preclearance provisions of the Voting Rights Act of 1965. 30 Fed. Reg. 9897 (1965); Stip. No. 43. Twelve Louisiana parishes, including Plaquemines, also have been designated for the appointment of federal examiners under the Voting Rights Act. See Stip. Nos. 44, 45.

At trial, numerous witnesses testified that for African Americans to

achieve electoral success, they would have to hide their race from potential white voters. Tr. 64-66, 70, 94. As a result, fund-raising for these African-American candidates was limited primarily to minority communities, which tend to be economically disadvantaged. Tr. 106. Other witnesses testified that money, and the name recognition it creates, are the keys to electoral success for judicial candidates. Tr. 116, Pl. Ex. 4. See also Tr. 25 (diatrict court judge testifying he would be "intimidated" campaigning in Plaquemines or St. Bernard Parishes).

When taken in its entirety, the history of racial discrimination in Louisiana has resulted in extreme economic disadvantages for African Americans. These disadvantages, occurring in conjunction with an

electoral system with dilutive features, have resulted in a remarkable lack of electoral success for African Americans. No African American has ever been elected to the Louisiana Supreme Court, and there are no elected African-American judges in the majority-white parishes of the First District. There have, however, been several successful candidacies in Orleans Parish, which has an African-American majority. See Stip. No. 52; Pets.' Supp. App., Table 1.

C. The Need for Remedial Action

The Statement of the Case and Part V of the Brief of Petitioners Chisom, et al., details their proof of the three Gingles factors and various Senate factors. In particular, the evidence in this case reviewed here demonstrates two of the Senate factors, namely discriminatory history and continuing

effects. Senate Report 28-29. Indeed, the evidence regarding these factors is so extreme that it raises the specter of discriminatory purpose for the current electoral system, one born out of the notorious 1898 Constitution and maintained despite its clear dilutive effects.

III. THE CREATION OF TWO SINGLE-MEMBER DISTRICTS IN PLACE OF THE EXISTING MULTIMEMBER DISTRICT IS THE MOST EFFICIENT AND EFFECTIVE REMEDY IN THIS CASE

The Louisiana Supreme Court's First District provides a stark example of the potential for minority vote dilution when judicial elections are not held to the standards of § 2. Currently, a sizeable African-American population is submerged in the First District, the only multimember district in the state.[9]

[9] The First District is composed of the parishes of Orleans, Jefferson, St. Bernard, and Plaquemines.

Rather than separating this district into two single-member districts, the State has perpetuated a system which effectively eliminates the potential for African-American voters to elect a Louisiana Supreme Court justice of their choice.

A. Redistricting Is the Appropriate Remedy.

The Louisiana Supreme Court is composed of seven justices, five of whom are elected from single-member districts. The justices are elected to ten-year terms, and the two justices from the First District are not elected in the same year -- a mechanism that defeats the possibility for "single-shot

voting."[10] Additionally, Louisiana has imposed a majority vote requirement for judicial elections, see Stip. No. 50, which Congress has recognized as a factor to consider in minority vote dilution litigation. See Senate Report 28-29.

The discrepancy between the First District and the other five districts could easily be remedied by dividing the First District into two single-member districts, one with boundaries coterminous with Orleans Parish and the other composed of the three remaining

[10] Single shot voting allows voters to increase their relative support for their preferred candidate, by withholding support from non-preferred candidates. Under such a system, a ballot is not invalidated if the voter declines to vote for some positions.

parishes.[11] This traditional redistricting remedy would provide the sizeable African-American community of Orleans Parish with the opportunity to elect a candidate of its choice. Orleans Parish has historic and traditional boundaries, which have long been used as the election district for a wide range of offices, e.g. mayor, councilmembers at large, clerk of court, district attorney, civil and criminal sheriffs.

At trial, the State argued that splitting the First District into two single-member districts would create an inordinately small district (even though

[11] The population of the remedial Orleans Parish district would be over 61 percent African-American, with an African-American voting age population of 56.31 percent. 1990 Census, Pub. L. No. 94-171, Redistricting Counts (reproduced in Appendix 1).

it would contain approximately half-a-million persons). This "concern" is illusory, however, because the population deviations among the current Supreme Court districts demonstrates that Louisiana has neither articulated nor pursued an interest in providing equal weight to each vote in judicial elections.[12] Nor is Louisiana required to follow the principle of one-person, one-vote. See Wells v. Edwards, 347 F.Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973).

The existing districting scheme results in a population deviation among

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12 According to the district court, the districts deviated from the ideal population size by the following percentages: First District, -8.3%; Second District, -3.1%; Third District, +15.3%; Fourth District, -31.6%; Fifth District, +43.3%; Sixth District, -7.4%. Chisom v. Roemer, No. 86-4057 (E.D. La. Sep. 13, 1989), reprinted in Pet. for Cert. App. at 12a.

the districts of 74.95 percent, using the 1980 census data, and of 87.47 percent, using the 1990 census data. See Appendix 2. These deviations would not be increased by the remedy sought by Petitioners Chisom, et al., and urged by Amicus, because the two districts produced by splitting the First District in this manner would be neither the largest nor the smallest of Louisiana's Supreme Court election districts.

B. Redistricting is Now Easier and More Effective

Throughout most of the history of Louisiana's election of judicial officers, the districting plan for the election of the Supreme Court has been based in the Constitution. La Const. (1854), art. 64. In the 1974 Constitution, however, the districting plan for the Supreme Court was shifted

to a statutory basis. La. Const. art. V, § 4. In 1975, the Legislature established the current districts. See La. Rev. Stat. Ann. § 13:101 (West 1983). This new statutory basis for Supreme Court districting allows for a more expeditious redistricting of the judicial districts as a remedy in this case. On remand, therefore, the court below should invite the Louisiana Legislature to redraw the First District in light of the 1990 census data. Those data reflect a clear African-American majority in voting age population in Orleans Parish. See Appendix 1.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded for invalidation and

remediation of the election system.

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Mar. 1991.

APPENDIX 1

	Total Population* (%)	Black Population (% of Total Population)	Total VAP (%)	Black VAP (% of Total VAP)
District 1	1,037,450 (100.00)	395,825 (38.15)	754,394 (100.00)	257,608 (34.15)
Orleans	496,938 (100.00)	307,728 (61.92)	360,476 (100.00)	202,995 (56.31)
Remaining Parishes**	540,512 (100.00)	88,097 (16.30)	393,918 (100.00)	54,613 (13.86)

* Population figures based on 1990 census.
** Jefferson, St. Bernard, and Plaquemines

APPENDIX 2

	Total Population*	% Deviation From Ideal District
District 1	1,037,450	-13.95
District 2	582,012	-3.46
District 3	701,584	+16.38
District 4	392,018	-34.97
District 5	919,372	+52.50
District 6	587,537	-2.54

* Population figures based on 1990 census.

(10) (7)

No. 90-757 and No. 90-1032

Supreme Court, U.S.
FILED
MAR 4 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHISOM,

Petitioner,

v.

ROEMER, GOV. OF LOUISIANA

Respondent.

UNITED STATES

Petitioner,

v.

ROEMER, GOV. OF LOUISIANA

Respondent.

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by

promoting merit selection as the method for choosing such judges.

The cases before the Court do not concern application of the Voting Rights Act to the merit-based selection of judges, and the Society takes no position on the application of the Act to the selection of judges through at-large, competitive elections. But because the Court's decision might be used to question the validity of merit selection systems now being used in a majority of the states, the Society files this *amicus* brief to inform the Court of the operation and spread of merit selection systems and to explain why the Court should not decide the present controversy in a manner that implicates judicial choice by merit selection.[1]

SUMMARY OF ARGUMENT

Merit selection provides a superior method for selecting state judges. Merit selection systems require state executives to appoint judges from a short list of only the most highly qualified candidates nominated by non-partisan commissions. This procedure increases the quality of state court judges, makes them less susceptible to political influences, results in greater representation of minorities and women on state court benches, and enhances the legitimacy of the courts in the eyes of the public. The benefits of merit selection have led thirty-three states to adopt some form of merit selection in the last fifty years.

The Voting Rights Acts does not apply to merit selection procedures because such procedures are not elective. A system under which the state executive makes judicial appointments from a pool of qualified candidates, as to which citizens have no elective voice, simply does not result in voters of one class receiving "less opportunity than other

---

[1] Pursuant to Rule 37 of the Rules of this Court, the parties to the consolidated cases have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973 (1988). And, although many merit selection systems grant the public a form of popular veto over judges through periodic retention elections, neither do such elections result in the election of public representatives within the meaning of the Act because Judges removed through retention elections are replaced by executive appointment, not by popular election. Therefore, in deciding the cases before it, the Court should do nothing to suggest that the Voting Rights Act applies to merit selection of judges by the states.

ARGUMENT

A. Merit Selection Is A Superior Method For Selecting State Judges.

Albert Kales, the Society's first director of research, formulated the original merit selection proposal in 1914. For the next several years the Society refined and expanded the proposal and it was subsequently endorsed by The American Bar Association in 1937. In 1940, Missouri became the first state to adopt merit selection. Under its most traditional form, merit selection calls upon a non-partisan nominating commission to select qualified candidates for a judicial opening. The state executive is required to fill the judicial vacancy from among the limited group of candidates nominated by the commission. Under most merit plans, when the judicial term of office expires and at regular intervals thereafter, the judge is subject to a retention election at which he or she runs unopposed on the basis of his or her judicial record. If the judge is not retained by the public, the vacant seat is filled by appointment through the same merit selection process. American Judicature Society, *Model Judicial Selection Provisions* (1985). This approach to judicial selection preserves the appointment prerogative of the executive and the safeguards of public approval, while ensuring that persons appointed are well qualified for the bench.

Merit selection provides many benefits, the foremost being an enhanced quality of state judges. Non-partisan commissions which nominate judicial candidates under merit selection systems are charged with seeking out the best judicial talent available. State executives must make their appointments from candidates so identified. This process, while not eliminating political considerations entirely, places greater emphasis on judicial qualifications than an unfettered political appointment system or a general competitive election. A 1979 poll of jurisdictions with merit selection revealed, almost without exception, that judicial quality had improved. American Judicature Society, *Judicial Selection Update: How Commissioners Rate Their Own Judicial Selection Plans* (1979).

Merit selection also makes the judiciary more independent from political influences and public pressure. Judges chosen through merit selection need not initially engage in the overtly political activities of judges selected through public elections, such as campaigning for office, aligning themselves with particular political parties, and soliciting campaign funds. And, because judges appointed through merit selection generally have a greater assurance of extended tenure, political factors and public opinion play less of a role in their decisions.

Merit selection systems also provide more frequent judicial opportunities to minorities and women. Studies recently completed by the Society show that of the 20 black jurists currently serving on state courts of last resort, 10 were chosen through merit selection, 7 through pure appointment by the executive, 2 through legislative appointment, and 1 through popular election. American Judicature Society, *Black Justices Currently Serving On State Courts of Last Resort: Methods of Initial Selection* (September 1990). *See also*, Fund for Modern Courts, Inc., *Success of Women and Minorities in Achieving Judicial Office: The Selection Process* 69 (Dec. 1985) ("merit selection produced the highest percentage of women and minorities to reach the bench of the six methods studied."). In Florida,

where appellate judges are chosen by merit selection and trial judges are elected, "nineteen out of twenty-three black judges . . . came to the bench through the merit selection process." Overton, *Trial Judges and Political Elections: A Time For Re-examination*, 2 U. Fla. J. of L. & Pub. Pol'y. 9, 20 (1988-89).

Similarly, of the 35 women currently serving on state courts of last resort, 17 achieved the bench by merit selection, 10 by executive appointment, 4 by legislative appointment, and 4 by public election. American Judicature Society, *Women Justices Currently Serving on State Courts of Last Resort: Methods of Initial Selection* (Sept. 1990); Fund for Modern Courts, Inc., *supra*. In Florida, 41 of 71 women judges came to the bench through merit selection appointment. Overton, *supra*, at 20.

The benefits of merit selection are evidenced by the number of states that have adopted such a system in the last half-century. Missouri began the shift when it established a merit selection system in 1940. Since then, thirty-three states and the District of Columbia have adopted a form of judicial merit selection to choose some or all of their judges.[2] Indeed, with only one exception, every state which has changed its judicial selection system in the last forty-one years has changed to merit selection.[3]

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[2] The states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

[3] The lone exception is Georgia, which switched from partisan to non-partisan elections in 1983.

B. Section Two Of The Voting Rights Act Does Not Apply To Merit Selection.

The gravamen of a claim under the Voting Rights Act is that members of a protected class have "less opportunity than other members of the electorate to participate in the political process and *to elect representatives of their choice*." The Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1988) (emphasis added). While the Court may determine in these cases that the Voting Rights Act applies to contested, at-large judicial elections, the Act cannot apply to the merit selection of judges. Merit selection systems grant the electorate no direct voice in filling judicial vacancies. Rather, judges are appointed by the executive branch from a pool of candidates nominated by a non-partisan commission. No voter in a protected class has less say about the choice of a judge than other voters. Thus, the Voting Rights Act, by its very terms, has no application to merit-based judicial appointments.

Lower federal courts have so held. In *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988), Illinois voters challenged state methods for selecting judges under section two of the Act. The court found that the complaint stated a claim as to judges who were selected through public elections, but dismissed the claim as to judges who were appointed. The court recognized the fundamental distinction under the Act between systems that fill vacancies through public elections and those that fill vacancies through appointment:

> By its very terms, the Act extends only to mechanisms involved in the election of representatives. However, the people of Cook County do not elect the Associate Circuit Court judges; they are appointed by the regular Circuit Court judges. Because Associate Circuit Court judges are not elected representatives of the people within the plain meaning of the Act, we hold that the plaintiffs cannot challenge the appointment of Associate Circuit Court judges. Though the plaintiffs contend that full relief requires reappointment of all Associate Circuit Court judges by properly elected Circuit Court judges, we cannot extend coverage of the Voting Rights Act beyond its terms. The Voting Rights Act covers elected officials only. Associate judges are appointed officials.

Williams, 696 F. Supp. at 1568-69; *see also Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1357-58 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2589 (1990) (considerable doubt as to whether section 2 applies to appointive offices); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981), *aff'd mem. sub nom. Hightower v. Searcy*, 455 U.S. 984 (1982) (appointive system for school board did not implicate Voting Rights Act); *Irby v. Fitz-Hugh*, 693 F. Supp. 424, 435 (E.D.Va. 1988) (same). The Society believes that the Act was applied correctly in *Williams*, and requests that this Court say nothing in its disposition of the cases at bar to suggest that the Act applies to appointive systems such as merit selection.

C. The Voting Right Act Should Not Be Applied To Retention Elections.

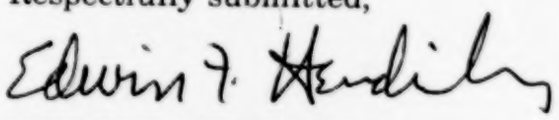
Merit selection is an appointive process, but many merit selection systems provide the public with a voice in retaining judges through popular vote. Retention elections function as a kind of popular veto, allowing the public to dismiss a judge who has already been appointed but providing voters with no right to select judges of their choice. Judges dismissed through retention elections are replaced by judges appointed by the executive through the merit-based selection process, with the voters having no voice in the candidates nominated or selected. Thus, retention elections do not deny protected classes the right "to elect representatives of their choice" within the terms of the Voting Rights Act, 42 U.S.C. § 1973 (1988). Because the retention

aspect of merit selection systems is not before the Court in the present cases, the Society requests that the Court say nothing in its disposition of these cases which would suggest that retention elections are subject to the provisions of the Voting Rights Act.

CONCLUSION

For the above reasons, the American Judicature Society respectfully requests the Court not to implicate judicial choice by merit selection in its disposition of these cases.

Respectfully submitted,



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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS, ROEMER, ET AL.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS, ROEMER, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of respondents, Roemer, *et al.* Written consent to the filing of this brief has been granted by counsel for both parties to this action. Copies of the letters of consent have been lodged with the Clerk of this Court.

IDENTITY AND INTERESTS OF AMICUS

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization, incorporated under the laws of California, formed for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation believes that the federal government has broad authority under the Constitution and various statutes to eliminate racial discrimination. However, local governments should be restricted by this federal power only when circumstances compel such restriction and only when the facts justify it. Intrusion on the basic processes of localities can be justified by no less. In this particular case, the Fifth Circuit Court of Appeals has held that Section 2(b) of the Voting Rights Act does not apply to judicial elections. The petitioners would have the judicial election scheme at issue here, which is without discriminatory purpose, trigger the broad remedial powers of the court in possibly dismantling a judicial election system that has served Louisiana for over a century, thereby subjecting a state's basic political processes to federal interference. This result is justified neither by precedent nor by common sense.

PLF's public policy perspective and litigation experience in the Voting Rights Act arena will provide an

additional viewpoint with respect to the issues presented. PLF participated in an earlier Voting Rights Act case before this Court, *Rome v. United States of America*, 446 U.S. 156 (1980) (a Section 5 case dealing with municipal annexations), and is submitting an amicus brief in *League of United Latin American Citizens v. Mattox* concurrent with this brief. PLF believes the Fifth Circuit correctly analyzed the holdings of this Court and lower courts in its decision that excluded judges from the term "representatives."

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Chisom v. Roemer*, 917 F.2d 187 (5th Cir. 1990). The court, in a per curiam opinion, remanded the case (which concerns the at-large election of Louisiana Supreme Court justices) to the District Court with instructions to dismiss all claims under the Voting Rights Act in light of its previous opinion in *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir. 1990).

SUMMARY OF ARGUMENT

The stated goal of Section 2 of the Voting Rights Act is to prevent racial discrimination at the polls so that minorities can "elect *representatives* of their choice."[1] The

[1] 42 U.S.C. § 1973(2).

term "representatives," as used in Section 2, should be limited to state officials who make law, and not extended to those who interpret it. The Louisiana Supreme Court is the authoritative source of state law, including the state constitution. Supreme Court justices do not represent the special interests of any constituency and certainly not the special interests of any racial group. Their function is to administer justice fairly, efficiently, and impartially for all. States have never drawn judicial districts so as to recognize the special interests of any group of citizens in the community.

The application of Section 2 to judicial elections has the potential for a tremendous impact on many states' electoral systems. Remedial measures resulting from such application may force the invalidation of judicial electoral systems. Such invalidation substitutes federal judicial judgment for that of the citizens as to what their form of government should be. By doing so, federal courts will overstep the boundaries mandated by federalism. Congress did not extend Section 2 to *all* electoral practices and systems but only to the election of *representatives* from multimember districts.

Elections for representatives in which vote dilution has been shown can be cured by redistricting under the one-man, one-vote principle. In the case of elections for representatives, such a cure does not destroy the function of the office, invalidate the system, or infringe other constitutional rights or guarantees. On the other hand, these evils may well come to pass as a result of redistricting in the judicial election context.

ARGUMENT

I

VOTING RIGHTS ACT § 2(B) IMPLEMENTED A "RESULTS TEST" WHICH APPLIES ONLY TO "REPRESENTATIVES" AND JUDGES ARE NOT "REPRESENTATIVES"

If this Court reverses the Fifth Circuit decision, applies Section 2, and orders remedial action to the effect of subdividing the state Supreme Court district into, essentially, a "white" district and a "black" district, this Court would dramatically alter an elected Supreme Court justice's independence and appearance of impartiality. Rather than enjoying the independence that accompanies accountability to the entire electorate, he would be rendered beholden to a small portion of those appearing before the court. Rather than applying the law impartially, he may be pressured to permit some state of affairs to continue, or to halt some other occurrence, if he intends to remain in office.

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group

Louisiana is divided into six districts from which the seven members of the Louisiana Supreme Court are elected. Each district elects one justice except the district composed of the four parishes which encompass the New Orleans metropolitan area. That district elects two justices. An elector with a case before the Louisiana Supreme Court will present his arguments to five or six judges with whom he has no connection whatsoever

Depending on the Supreme Court district in which he lives, he will have had the opportunity to vote for one or two of the justices on the panel. The lack of connection between the litigant and the justices is the linchpin of impartial justice. The American judicial system relies on citizens to voluntarily abide by court rulings, whether or not they agree or disagree with such rulings. It is therefore of fundamental importance that the judges handing down the rulings be perceived as being fair and unbiased.

Although petitioners seek subdistricting to improve judges' responsiveness to minorities, creating the subdistricts will not have the same impact on minority representation as it has in legislative elections. In legislative and administrative elections, officials are elected from a political subdivision to represent their constituents. The elected officials become part of a political decision-making body, such as a city council, school board, or legislature. Elected representatives form a collegial body charged with the responsibility of making decisions that reflect the policy preferences of their constituents. In the legislative/administrative context, single-member district elections ensure racial and language minority groups in the district do not suffer vote dilution. However, Supreme Court judges do not decide cases in the same manner as representative legislators. Each judge acts according to his own interpretation of the law, not necessarily that of the members of his district, in applying the law to the case at hand.

Subdistricting robs judges of their independence by focusing a very narrow public opinion over their decision-making process. Do petitioners really want judges responsive to public opinion in their districts? Public

opinion is an uncertain and constantly shifting barometer of community emotion. Public opinion gives little consideration to the determinations of law and fact at issue in a case. Public opinion is concerned solely with results. Certainly, most judges set aside concern for their reelection standing and render decisions without regard for such considerations. However, a party on the losing side of a court decision or ruling affecting life, liberty, or property should not be left to wonder whether that decision or ruling was influenced by special interest perspectives and prospects for reelection.

B. The Judiciary Performs an Antimajoritarian Role

The Framers of the Constitution intended legislative representatives and judges to be treated differently under the law. These officials are provided for in different articles in the body of the Constitution. United States Constitution Articles I and III. Further, the difference between legislative representatives, who service the special interests of their constituents, and judges, who do not, is accentuated by the Framers' recital of the duties and prohibitions of the respective offices. The executive and legislative branches are subject to an elaborate system of rules while the judiciary is not. The plain meaning of the word "representative" cannot be strained to encompass judges, who simply do not have a constituency. Judges, be they trial or appellate, should apply the law as they see it, without a political agenda or interest.

Alexander Hamilton, in a sequence of Federalist Papers, stressed the importance of an independent judiciary. Far from equating judicial officers with "representatives," he expressed concern that the judiciary be free

from the "encroachments and oppressions" of the representative body. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). The independent judiciary was held up to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

Not only was the judicial branch created to be non-representative, but Hamilton asserted that " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Id.* at 466 (quoting Montesquieu, *Spirit of Laws*, Vol. 1, at 186 (1750)). Furthermore, Hamilton was fully aware of the ever-changing whims of public opinion. Hence, the antimajoritarian role of the judiciary is clear:

> "It is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the . . . Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body." *Id.* at 469-70.

Hamilton cautioned strongly against allowing an independent judiciary to be infiltrated by a sense of responsiveness to segments of the community. It is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community. *Id.* at 470.

Necessarily, judges' decisions may not reflect the majority or special interest will. Their decisions often must enforce constitutional guarantees in the face of special interest opposition. To fulfill this role, judges should be motivated solely by principle, not by perceived ties to constituents.

> "Few of us would want an electorate that thought there were no differences at all between judging and political activity. To erode the perception of this distinction is dangerous; it risks result-oriented adjudication independent of any satisfactory rule structure . . . . The continuing perception of an institution of electing or removing judges may over time weaken the idea that adjudication ordinarily is sharply different from doing politics."[2]

A judge should never have to worry that an unpopular decision alone will cast him out of the judiciary.

C. Federal Rules Have Provided Great Protection Against Any Possibility of Bias

Federal courts have addressed the issue of bias in other contexts. The judiciary certainly has not turned a blind eye to the existence of possible bias in its own branch of government. Yet as much as the judiciary combats bias in its ranks, courts have carefully drawn their opinions to stay within the limits of the Constitution and statutes under which challenges are brought. The creation of diversity jurisdiction and the ability of defendants to

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[2] Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. Cal. L. Rev. 1555, 1559 (1988).

remove cases to federal court are based on the concern that local litigants could benefit from a hearing before a local judge. The Federalist Papers Nos. 80 and 81 emphasize this point: "[J]udicial authority of the Union ought to extend to . . . cases . . . in which the State tribunals cannot be supposed to be impartial and unbiased." The Federalist No. 80, at 475 (A. Hamilton). This is necessary because "the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of natural causes." The Federalist No. 81, at 486 (A. Hamilton).

The historical basis of diversity jurisdiction was to protect nondomiciliaries from local prejudice. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980). The theory on which jurisdiction is conferred on federal courts in controversies between citizens of the different states has its foundation in the supposition that possibly the state tribunal may not be impartial between its own citizens and nonresidents. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856).

At one time the removal jurisdiction statute, 28 U.S.C. § 1441, expressly listed local bias as a reason for removal. 28 U.S.C.A. § 1441, historical note. All of the provisions with reference to removal because of the inability, due to prejudice or local influence, to obtain justice have since been discarded. The historical note to Section 1441 explains that "[t]hese provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." *Id.* So much has been done to eradicate

biases; the subdistricting of judicial election districts is a swing in the wrong direction.

No right exists for litigants to vote on the particular judges who may hear their cases. As it is now, citizens before the Louisiana Supreme Court cannot challenge the five or six judges whom the litigant had no opportunity to elect simply because of that lack of opportunity. Neither should the litigant be able to challenge the justices elected from the First Supreme Court District by forcing the division of that district.

II

THE IMPACT OF EXPANDING VOTING RIGHTS ACT § 2(B) TO JUDICIAL ELECTIONS WOULD BE DEVASTATING TO THE MANY STATES THAT ELECT JUDGES ON A DISTRICT-WIDE BASIS

Judicial elections are unique compared to elections for legislative and administrative offices. Judicial elections are distinguished by lower levels of turnout, less competition, and greater reliance by the voters on factors such as incumbency, previous judicial experience, and party affiliation in making choices among competing candidates. Weber, *The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective*, 73 Judicature 85, 86 (1989). Thus, this Court should exercise caution in reaching conclusions about voter polarization and dilution in judicial elections based on past experience with elections for legislative and administrative offices.

Although Supreme Court justices act as a collegial body and therefore are distinguishable from trial judges,

even within that collegial body judges do not serve the same functions or reach decisions in the same way as legislators or other "representatives" of constituencies with special interests. Rather, Supreme Court justices serve the powerful state function of administering fair and efficient justice. In that regard their function, like the function of trial judges, is nonlegislative, and at-large nonproportional districting is appropriate to the nature of the office.

Minorities have already challenged state judicial election systems in Georgia, Illinois, Alabama, North Carolina, Ohio, Mississippi, and Florida[3] in addition to the Texas and Louisiana cases currently before this Court. Each state that elects judges has its own method of doing so, be it by at-large elections, by district, or some other method. California elects Supreme Court justices on an at-large basis. If Section 2 is applied to judicial elections in Texas and Louisiana, the trend would undoubtedly spread to California. Consider the implications if each region of California is designated a justice. The result of splitting up the state into districts would result in smaller, more homogenous constituencies, *e.g.*, the San Francisco District, the Orange County District, and the Los Angeles District (which would be forced to have two

[3] *Brooks v. Glynn County, Georgia, Board of Elections*, 1989 WL 180759 (S.D. Ga. 1989); *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988); *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1988); *Alexander v. Martin*, 86-0148-CIV-5 (E.D. N.C. 1987); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); and *AlHakim v. State of Florida*, 88-14165-CIV-T-10"A" (M.D. Fla. 1988).

justices, requiring the split of Los Angeles into perhaps Eastern and Western Districts). These districts would intolerably exacerbate political pressures on judges. Moreover, California Supreme Court "representative" justices may become beholden to certain interests in geographic areas of the state. For example, as the northern and southern regions of the state litigate over water rights, "northern" and "southern" justices would feel compelled to decide cases so as to benefit their constituency if they intended to retain their post.

Louisiana made a conscious choice over a hundred years ago to elect Supreme Court justices from districts, and to allow the largest metropolitan area to remain one district even though it elects two justices. Delegates from all regions of Louisiana, assembled at the 1973 Louisiana Constitutional Convention, reaffirmed that choice. *Chisom v. Roemer*, Brief of Defendants-Appellees, United States Court of Appeals for the Fifth Circuit, No. 89-3654, at 5-7. Remedial measures imposed by federal courts to cure a Section 2 violation may totally rework the state system to such an extent that state citizens no longer even recognize the system their elected state representatives established. In a case where no intentional discrimination exists, a federal court should not dramatically alter a state system. Wholesale changes or intrusive alterations of the nature and operation of a state's judicial branch violates the principles of federalism.

CONCLUSION

To ascribe particular sets of views to judges because of the color of their skin is clearly in error. Yet the petitioners here seem to believe that only a member of a minority group will be responsive to the interests of that group. If this Court determines that state judicial elections are subject to Section 2, and if single-member or smaller multimember judicial districts, some with majority black populations, are created as a remedy, then state court judges will be held accountable, as "representatives," to a smaller, more ethnically and racially homogenous population.

Requiring judges to be "representatives" insults not only the judges who sit on the state and federal benches, but the entire electorate. To hold, in effect, that a black litigant is more likely to receive a sympathetic ear from a black judge, who will not ignore minority interests, *Thornburg v. Gingles*, 478 U.S. 30, 48 n.14 (1986), impugns the integrity of both black and nonblack judges. Judges of all races, creeds, and colors are presumed to be impartial; presumed to decide cases on the merits, not on the color or political persuasion of the litigants. Moreover, the judges composing the entire judiciary of a state is far from homogenous in philosophy, political leanings, and view of the law and its application. Therefore, the exemption that Congress carved out of the Voting Rights Act for

judicial elections should be upheld, and the Fifth Circuit's opinion should be affirmed.

DATED: April, 1991.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Nos. 90-757 and 90-1032

RONALD CHISOM, *ET AL.*, PETITIONERS,

v.

CHARLES E. ROEMER, *ET AL.*

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, *ET AL.*

BRIEF FOR *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law center, based in Washington, D.C., with over 120,000 members and supporters nationwide. WLF has participated in and has devoted a substantial portion of its resources to cases relating to voting rights. WLF filed *amicus curiae* briefs in *Thornburg v.*

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[1]This brief is being filed with the written consent of the parties. Their consents are on file with the Clerk of this Court.

Gingles, 106 S. Ct. 2752 (1986) and *City of Pleasant Grove v. U.S.*, 107 S. Ct. 794 (1987). More pertinently, WLF filed briefs in the instant case below, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988); and in the related case *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990)(hereinafter "*LULAC*").

In this case, WLF seeks to protect the interests of its members in the proper interpretation of the federal Voting Rights Act of 1965, as amended ("VRA"). The court below correctly concluded that the results test of Section 2 of the VRA did not apply to judicial elections -- a decision which accurately reflects the history and meaning of the VRA. WLF believes that as a matter of law and sound public policy, Congress had good reasons for excluding the judiciary from the definition of "representatives" in Section 2. Any changes to include the judiciary under Section 2 should be clearly expressed by the Congress after full debate rather than by distorting statutory language chosen by Congress.

The Allied Education Foundation ("AEF") joins WLF as an *amicus* on this brief. AEF, established in 1964, is a non-profit, charitable and educational foundation based in Englewood, New Jersey, and devoted to the expansion of knowledge in a broad variety of areas including voting rights and the political process. AEF has appeared along with WLF as *amicus* in *Chisom v. Edwards* below and several cases before the United States Supreme Court.

STATEMENT OF THE CASE

Amici adopt by reference the Statement of the Case by respondents. Nevertheless, *amici* wish to note the following pertinent facts. The Supreme Court of Louisiana consists of seven members who are elected

from six judicial districts; two from the First District, and one each from the remaining five. The petitioners essentially allege that the system of electing the two judges in the First Supreme Court District of Louisiana constitutes a violation of Section 2 of the Voting Rights Act (VRA) because allowing two judges to be elected from the First District which has approximately 68 percent white voters and 32 percent black, "illegally dilutes the voting strength of Orleans Parish's African American voters by submerging that majority African American parish in a majority white district." Chisom Br. 4. In essence, Chisom seeks to divide the First District into two separate districts in such a way that minority voters constitute a majority in one district, presumably to ensure the election of a black judge to Louisiana's highest court.

SUMMARY OF ARGUMENT

In amending the Voting Rights Act of 1965 in 1982, Congress enacted the "results test" to prove voting discrimination, a test previously rejected by this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In doing so, however, Congress limited the applicability of the test to the election of "representatives" and thus excluded elected members of the judiciary from the reach of Section 2. The plain and ordinary meaning of that term does not include judges. The role of judges is both historically and jurisprudentially different from that of the political legislative branches. In addition, case law demonstrates that the concept of voter dilution is *not* applicable to judicial elections. Because Section 2 is based entirely upon voter dilution, that section does not apply to judicial elections.

ARGUMENT

I. THE ELECTION OF JUDGES IS NOT SUBJECT TO SECTION 2 OF THE VOTING RIGHTS ACT BECAUSE JUDGES ARE NOT "REPRESENTATIVES."

A. The Plain Meaning Of "Representatives" In Section 2 Of The VRA Does Not Include Members Of The Judicial Branch.

The 1982 amendment of the Voting Rights Act of 1965 added language describing those circumstances that would constitute a violation of Section 2. Section 2(b) expressly states that a violation exists when "[members of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice."

This Court has repeatedly affirmed the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Stated another way, courts are required to assume "that the legislative purpose is expressed by the ordinary meaning of the words used," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richard v. United States*, 369 U.S. 1, 9 (1962)). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n.12 (1987) (Court looks to message conveyed by "the plain language of [the] statute" and looks at the "legislative history to determine only whether there is

'clearly expressed legislative intention' contrary to that language").[3]

According to Black's Law Dictionary, the ordinary meaning of the word "representative" is "A person chosen by the people to represent their several interests in a legislative body; *e.g.* representative elected to serve in Congress from a state congressional district." Black's Law Dictionary 1302 (6th ed. 1990). Clearly, the ordinary meaning of the term "representative" in the context of elections is a legislative or executive office holder, not a judge.

Judges, by their very definition, do not "represent" voters but are "appointed [or elected] to preside and to administer the law." Black's Law Dictionary (6th ed. 1990). Unlike legislative bodies, judges do not make decisions as representatives of their electorate. No segment of the electorate can be overrepresented or underrepresented in the minds of the judicial branch. A judge's duty is to apply the law as best he can, and the race, sex, or geographical location of his colleagues enters into the balance not at all. As expressed by Hamilton in *Federalist*, No. 78:

> If it is to be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from

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[3] *See also Sullivan v. Stroop*, 110 S.Ct. 2499, 2502 (1990); *United States v. Locke*, 471 U.S. 84, 96 (1985); *Mohasco Corp. v. Silver*, 447 U.S. 807, 813 (1980)(literal reading of civil rights law required even though there is a "strong federal policy of insuring that employment discrimination is redressed").

> any particular provisions in the constitution. It is not otherwise to be supposed that the constitution would intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. . . .

And as the en banc court in *LULAC* emphasized:

> We reiterate that judges do not represent people and, thus, have no constitutents. Judges speak the voice of the law. In doing so they speak for and to the *entire* community, never for segments of it and still less for particular individuals. To describe the judge's office merely as "not a representative one" is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan.

914 F.2d at 628 (emphasis in original).

Amici submit that the principles underlying the role of the federal judiciary are equally applicable to the judiciary of the individual states. For example, in *Morial v. Judiciary Committee of State of Louisiana*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978), the Fifth Circuit held:

> The Louisiana constitution, like the federal constitution, creates a separate judicial branch. Article V of the Louisiana constitution is devoted

> entirely to the functions and duties of that branch. The structure, powers, duties, and emoluments of the state's judiciary are treated differently from those of "Public Officials," who are dealt with in a separate article of the constitution, article IX.
>
> Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind. For example, the contours of the function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns of most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. He cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result. Moreover, the judge acts on individuals cases and not broad programs. The judge legislates but interstitially; the progress through the law of a particular judge's social and policy performance preference is, in Mr. Justice Holmes' words, "confined from molar to molecular motion." (Footnote omitted) (Citation omitted).

Id. at 305.

In Louisiana, judges are elected in *non-partisan* elections (LSA-R.S. 18:401(B)) from among candidates who "have been admitted to the practice of law in this state for at least 5 years prior to his election, and shall have been domiciled in the respective district . . . for the two years proceeding election." La. Const. art. V, Section

24 (1974). By comparison, the qualifications for a Louisiana state legislator are that the candidate need only have "obtained the age of 18 years, resided in the state for the preceding two years, and been actually domiciled for the preceding year in the legislative district from which he seeks election." La. Const. art. III, Section 4 (1974). The distinction that judges have legal training and experience underscores their role and function of interpreting the law, rather than creating laws to suit political or public policy demands. In addition, as will be discussed *infra*, the distinction shows why the usual factors used by minority plaintiffs to demonstrate voter dilution in legislative elections are inapposite in the context of judicial elections.

Other courts have clarified the fundamental distinction between judicial office and representative office:

> Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system.

Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio), *app. dismissed*, 385 U.S. 3 (1966).

To avoid any mistaken conclusion that might be drawn from the requirements that judges come from certain judicial districts, a federal court has noted:

> These judges are hybrid officials with both local and statewide functions and authority. The requirement that he reside from the district in which he is elected is a matter of convenience,

> making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and he may be assigned beyond his division by the Chief Justice.

Holshouser v. Scott, 335 F. Supp. 928, 933 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972). Indeed, judges "are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964). As recently as 1986, the Supreme Court in reviewing voting rights cases has never suggested that the VRA extends to any category of elected officials other than "representatives." *See Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986).

"Representatives" therefore has a clear, unambiguous legal meaning. It is a term of art and it cannot be assumed to have a novel, generic meaning within the context of the VRA. The courts should indeed accept the plain language of any statute as the true expression of Congressional intent. Surely the United States House of *Representatives*, in approving Section 2, ought to at least be credited with knowing the correct meaning of that word. Since the meaning of "representatives" is plain, "that is the end of the matter, for the court . . . must give effect to the unamibiguous expressed intent of Congress." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

As the lower court stated, "to suggest that congress chose "representatives" with the intent of including judges is roughly on a par with suggesting that the term *night*

may, in a given circumstance, properly be read to include *day*." *LULAC*, 914 F.2d at 629.[3]

B. The Legislative History Of Section 2 Also Demonstrates That The Statute Was Not Intended To Apply To Judicial Elections.

While resort to legislative history is neither proper nor necessary where the statutory language is clear,[4] the history of Section 2 does not support the petitioners'

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[3] An additional argument made by the petitioners to show that the term "representatives" includes elected judges is the notion that in criminal cases, unelected juries which perform their function in the judicial setting have been generally regarded as "representatives of the people." Chisom Br. 56-62; U.S. Br. 23-24. However, the "representativeness" of juries, a general characterization used in the context of a criminal defendant's Sixth Amendment right (or an excluded venireman's Fourteenth Amendment right) sheds no light on what the Congress specifically intended by the term "representatives" used in the context of voting rights legislation. Under petitioners' theory, if unelected jurors are "representatives," a hypothetical system of electing professional jurors should make them even more representative. The petitioners are clearly grabbing at straws by trying to find the broadest definition of the word "representative" outside of the election context in which Congress chose to use that word.

[4] As this Court recently stated:

> The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous--that has a clearly accepted meaning in both legislative and judicial practice--we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

West Virginia University Hospitals, Inc. v. Casey, 59 U.S.L.W. 4180, 4184 (U.S. Mar. 19, 1991).

position that Congress intended the results test to apply to the judiciary. The Voting Rights Act, when originally approved and through subsequent amendment, was certainly one of the most heavily debated and, to some members of Congress, most controversial pieces of legislation. It cannot be assumed that both houses of Congress simply allowed enactment of the VRA without careful consideration of each affected area -- including one entire branch of our form of government.

Therefore, while the legislative history of the Voting Rights Act does not directly address the issue of Section 2 applicability to the judiciary, the absence of any clear indication of applicability leads to the inevitable conclusion that members of the judiciary were never meant to be included within its scope. Although perhaps not in 1965, by the time the 1982 VRA amendments were debated, many states had elected judges and the word "representatives" as chosen for the amended Section 2 could not at that time have been considered synonymous with all "elected officials."

Furthermore, as the lower court observed, at the time that Congress enacted the amendments to the VRA in 1982, "at least fifteen published opinions by federal courts . . . had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections. Not one held the contrary." 914 F.2d at 626. *See, e.g., Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

The only direct mention of judicial districts in the legislative history is contained in a short statement by Senator Orrin Hatch. Senator Hatch was at the time voicing his strong opposition to the legislative reversal of

Mobile v. Bolden, 446 U.S. 55 (1980), through the Section 2 revisions. That statement argued:

> Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of Section 2. It is important to emphasize at the onset that for the purposes of Section 2, the term "political subdivision" encompasses all governmental units, including city and county officials, school boards, judicial districts, utility districts, as well as state legislatures.

S. Rep. No. 97-417, 97 Cong., 2d Sess. 127, 151, *reprinted in* 1982 U.S. Code Cong. & Admin. News 298, 323. The court below properly discounted the value of this legislative "scrap" or "scouring," noting that it does not refer to judicial candidates but judicial districts. In Lousiana and many other states, sheriffs, clerks of court, highway commissioners, and other non-judges are elected according to judicial districts. 914 F.2d at 630, n.14.

Amici further submit that Senator Hatch's statement was meant to be argumentative and persuasive rather than intended to define the actual scope of the Act. Senator Hatch was obviously creating a strained interpretation of the Section 2 amendments' "results test" in order to dissuade other Senators from approving the revisions. The Senator did not provide any authority for his suggestion of the potential scope of Section 2 and it is unlikely indeed that he would have even uttered the comments had he thought that those words might be used to justify an expansive interpretation of the same amendments against which he so vigorously argued. Indeed, it would stifle future congressional debate if every extraordinary and twisted argument appearing deep within legislative history were raised to the level of legal

authority or precedent. Just as a dissenting opinion in a court case should not be construed as a definitive statement of what the law is, neither should "dissenting" statements of members of Congress be construed as legislative intent.

"The fears and doubts of the opposition are no authoritative guide. . . . It is the sponsors that we look to when the meaning of the statutory words is in doubt." *First Nat'l Bank v. Walker Bank & Trust Co.*, 358 U.S. 252, 259-60 (1966). As this Court has recognized, "[i]n their zeal to defeat a bill, [opponents] understandably tend to overstate its reach." *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). *See also Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956)("unsuccesful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill").

II. VOTER DILUTION, ALLEGED BY CHISOM AND UPON WHICH SECTION 2 IS BASED, IS NOT APPLICABLE TO JUDICIAL ELECTIONS.

The VRA was last amended in 1982 to clarify its meaning after a 1980 Supreme Court decision holding that Section 2 prohibited only intentional discrimination in voting practices. *Mobile v. Bolden, supra*. That amendment prohibits any voting procedure "which *results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (emphasis added). Congress also added a new Section 2(b) to explain the change:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to a nomination or election in the State or political

> subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process *and* to elect *representatives* of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis added).

The clear language that the members of the class must have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," in order to establish a right to relief under the present amended version of Section 2 constitutes a textbook definition of voter dilution. The requirements are conjunctive. The plaintiffs would not prevail by showing only that they have less opportunity "to participate in the political process." They must also show that they have less opportunity "to elect representatives of their choice." Section 2 guarantees that the voice of minority voters must be heard at the polls *and* represented in the government as strongly as the voices of nonminority voters.

Having demonstrated that Section 2 addresses the issue of voter dilution, the history of voter dilution shows that neither the dilution doctrine nor Section 2 is applicable to judicial elections. The concept of dilution stems from the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). This decision was well known to Congress in 1965, and the Supreme Court has held that Congress intended to incorporate into the Voting

Rights Act the broad concepts of voting set forth in that decision. *Allen v. State Board of Elections*, 393 U.S. 544, 565-66, 569 (1969). Indeed, the authors of the Senate Judiciary Committee Report looked to *Reynolds* in setting forth the scope of the most recent amendments to the Act. S. Rep. No. 417, 97th Cong., 2d Sess. 19-27 (1982) (hereinafter cited as Senate Report). *See also* Blacksher & Menefee, "At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution," in C. Davidson, *Minority Vote Dilution*, 203, 207-21 (1984); Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 718-719 (1983). *Cf. Thornburg* v. Gingles, 478 U.S. at 47, n.13.

In all of the judicial opinions and legislative history generated during the first 20 years under the Act, there is not a single suggestion that the concept of dilution reaches more broadly than the principles set forth in *Reynolds* and the cases that followed over the next several years. It was clear by the 1975 amendments to the Act, if not before, that the rule of *Reynolds* did not encompass a state's decisions with regard to the structure of its judiciary. "The Louisiana constitutional provisions, which this Court today upholds against appellants' renewed constitutional attack, provide for the election of the State's Supreme Court Justices from election districts that are established without regard to population." *Wells v. Edwards*, 409 U.S. 1095 (1973) (White, J., dissenting), *aff'g*, 347 F. Supp. 453 (M.D. La. 1972). The district court's decision in *Wells*, which the Supreme Court affirmed, held "that the concept of one-man one-vote apportionment does *not* apply to the judicial branch of the government." 347 F. Supp. at 454 (emphasis added). Just weeks before, the Supreme Court had summarily affirmed a holding of another District Court "that the one-man, one-vote does *not* apply to the State Judiciary."

Holshouser v. Scott, 335 F. Supp. 928, 932 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972) (emphasis added). *See also Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *app. dismissed*, 385 U.S. 3 (1966). Although the Supreme Court has not yet spoken on the subject, the only federal court to do so had held that "the one-man one-vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

The rationale of these decisions is immediately apparent. *Reynolds* addressed itself to the problem of assuring equal representation for all citizens in the multi-member legislative bodies. One way to do that, as the Supreme Court recognized in the context of State congressional delegations, is through at-large elections. *Wesberry v. Sanders*, 376 U.S. 1, 8 & n.11 (1964). As a practical matter, however, jurisdictions as large as States must elect their governing bodies from districts. As the Court noted in *Reynolds*:

> Legislators represent people, not trees or acres . . . And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of the state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighing and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.

377 U.S. at 562-63 (footnote omitted). The court correctly concluded, "[b]ut the basic principle of representative government remains, and must remain, unchanged -- the weight of a citizen's vote cannot be made to depend on where he lives." 377 U.S. at 567. If dilution thus applies only to representational bodies of government, neither dilution nor its statutory remedy found in Section 2 may apply to elections of the non-representational judiciary.

It having been established by 1982 that neither the Supreme Court nor the lower federal courts regarded judges as representatives subject to the dilution doctrine and that Section 2 addresses the issue of voter dilution, it is thus impossible to conclude otherwise than that Section 2 does not apply to the election of judges.

As previously noted, Chisom's complaint specifically charges that the present system of electing judges, whereby the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson elect two Justices to the Louisiana Supreme Court at-large from the First District is a violation of the 1965 Voting Rights Act, as amended, 42 U.S.C. § 1973 *because it allegedly dilutes the voting strength of the plaintiffs*. Chisom Br. 4. Chisom has therefore alleged voter dilution and sought a remedy through the VRA when the courts have already considered the scope of dilution and not found it applicable to judicial elections. The dilution doctrine is simply not applicable to non-representative government bodies such as the judiciary and therefore Chisom's claim that Section 2 applies must fail.

Accordingly, Chisom's Complaint does not allege facts that, even if taken as true, would prove that they have had less opportunity "to elect *representatives* of their choice" (emphasis added). They may or may not be able

to demonstrate that they have less opportunity to elect judges of their choice, but -- as demonstrated in Argument I, *supra*, judges are not representatives.

Chisom's allegations, therefore, could not possibly support a claim under Section 2. Unless there is strong evidence in the legislative history to demonstrate that Congress intended to classify judges as representatives, this Court could not find that their votes were diluted and should not act as a legislature of last resort incorporating judicial elections into the otherwise clear dilution language of Section 2.

It may further be noted that the application of Section 2 to judicial elections, proven inappropriate, may be found appropriate solely because Section 5 does, in fact, cover judicial elections. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986). The defendants in *Haith* argued that Section 5 did not apply to judicial elections, relying on the "one man, one vote" cases. In rejecting these cases as inapplicable the District Court stated:

> Discounting the interesting jurisprudential arguments arising from such an attempted distinction . . . it is quite clear that no such distinction can be attributed to [Section 5 of the Voting Rights] Act . . . As can be seen, the Act applies to all voting without any limitation to who, or what, is the object of the vote . . . We hold that the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of Section 5.

618 F. Supp. at 413.

The Court in *Haith* was quite specific in limiting the scope of its conclusion to Section 5. Furthermore, the substantial differences in language and history between Sections 2 and 5 have been noted on at least one other occasion. The Supreme Court held in *Allen v. State Board of Elections*, *supra*, that Section 5 was "intended to reach any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. at 566. This reference to a "minor way" is indicative that Section 5 goes to the mechanics of voting, *i.e.*, the "standard, practice or procedure" that requires pre-clearance (*Haith*, 618 F. Supp. at 413), rather than the fundamental right to vote for those who govern (*Thornburg v. Gingles*, *supra*) and therefore reinforces the distinction between Sections 2 and 5 and thus precluding the application of *Haith* to a Section 2 case.

Lastly, it may also be noted that the legislative history of Section 2 specifies that some practices that call into operation Section 5 do not necessarily run afoul of Section 2. For example, throughout the legislative history it is repeatedly noted that jurisdictions that require Department of Justice pre-clearance pursuant to Section 5 may have no Section 2 practices or violations. Senate Report, *supra*, at 68 & n.224.

While conceding that the argument that judges are not "representatives" is "a powerful one," U.S. Br. 34, the United States tries to take the edge off the prospect that the results test would be applied to a judicial election in the same way that it is applied to a legislative election by invoking the "totality of [the] circumstances" standard for a Section 2 challenge. Thus, the United States argues that because a judge performs duties unlike a typical representative, the functions or duties of the elected official may be a factor for a court to consider as part of the "totality of circumstances" test. U.S. Br. at 35. Yet

the nature of the office holder's function appears nowhere in the statute or the legislative history as a circumstance to be considered.

Section 2 explicitly states that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." 42 U.S.C. 1973(b). In addition, the Senate Report that accompanied the 1982 amendments to the VRA identified seven factors that could be considered as part of the relevant circumstances, such as the "extent to which voting in the elections of the state or political subdivision is racially polarized," and the "extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *See* Senate Report at 28-29 (1982). These factors have been recognized as "authoritative" by this Court. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

But nowhere in the statute or legislative history is there anything to suggest that the nature of the elected judge's function is to bear upon the meaning of "totality of circumstances"; indeed, petitioner Chisom, *et al.*, assert that at the trial in this case below, they proved *all* the seven factors identified by the Senate Report were present in their case. Chisom Br. 7-21. If Congress did indeed intend to include a whole branch of government within the sweep of Section 2 by using the term "representative," it certainly would have said something suggesting that functions performed by the elected official, *i.e.*, judges, would be a factor to be considered as part of the "totality of circumstances."

Thus, Chisom's proof of voting discrimination against blacks for the position of Louisiana Supreme Court Judge consists of noting that "[a]lthough 29 percent of Louisiana's citizens are African American, every supreme court district is majority-white both in total population and in number of registered voters. . . . No African American person has been elected to the Louisiana Supreme Court in modern times." Chisom Br. 7.

Yet the notion that it is relevant to compare the percentage of blacks in Louisiana to the percentage of black judges elected, especially to the 7 member Supreme Court which is the actual case here, is absurd. The relevant labor or candidate pool, so to speak, is not all black voters in Louisiana, but those qualified for the position. As previously noted, only those Lousiana citizens who have gone to law school, passed the bar, and were lawyers for at least 5 years are qualified to run for judicial office. LSA-R.S. 18:401(B). In that regard, *amici* submit that the percentage of qualified black lawyers is substantially lower than the percentage of black voters. [5] Thus, while it may make some sense to use population percentages with respect to assessing voter dilution claims with respect to elections to the legislative or executive branches inasmuch as those offices do not require the candidate to hold any degree, let alone post-graduate degrees, it is inappropriate to use those same population statistics in the context of judicial elections.

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[5] Because candidates for the Lousiana Supreme Court generally come from the lower courts, a more accurate calculation of the qualified candidate pool would be the current members of the lower courts, of which approximately six percent are black. Even this figure is large since it does not factor in the residency requirement that the judge reside in the district in which he or she is elected.

In addition, Chisom argues that certain socioeconomic factors such as education and employment can be used to show discrimination in the election of judges to the Supreme Court because black judicial candidates "have considerable difficulty raising campaign funds and that generally, the better funded candidates win." Chisom Br. 20. [6] Presumably, this socioeconomic factor referred to in the Senate Report as part of the "totality of circumstances" test can also be used to demonstrate the paucity of the number of qualified black lawyers and judges for the Supreme Court positions.[7]

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[6] *Cf. Williams v. City of Dallas*, 734 F. Supp. 1317, 1415 (N.D. Tex. 1990)(Voting Rights Act violated because "African-Americans and Hispanics . . . cannot raise--from their own communities" enough money to run effective campaign for at-large city council seat)(emphasis in original).

[7] Lousiana State University Law School graduates who took the Louisiana bar exam in 1990 had a pass rate of 81.4%; Loyola's rate was 62.2%; Tulane's rate was 60.9%; and Southern (which is over 90 percent black) had a pass rate of only 29.8%. Indeed, the pass rate overall for blacks, regardless of the law school attended in Louisiana, was 33.3%. *See* Memorandum of Dean John Kramer, Tulane University Law School, Oct. 4, 1990, *cited in* Tulane Law School, *Dicta: From the Bench*, Dec. 3, 1990 at 1. According to Dean Kramer, "[W]e encourage [minorities] to come here and then [they] graduate into an employment void based upon bar failure, but loaded with debt. * * * We have taken a commendable admissions risk, but the gamble didn't pay off in 1990. . . and the losers are not us, but those who[m] we invited and now watch twisting in the wind until the next exam or another state beckons." Id. According to petitioner's socioeconomic theory, these educational disadvantages which keep blacks from having the same opportunity as other members of the electorate "to participate in the political process and to elect representatives of their choice" presumably constitute yet additional evidence of a violation of Section 2 of the Voting Rights Act.

CONCLUSION

As the lower court held, "[s]hould Congress seek to install [a results] test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary." 914 F.2d at 631. And as this Court has said in a related context, "Congress, should it wish to do so, may * * * amend Title VII [to clearly express its intention that the law is to be applied abroad] and in doing so will be able to calibrate its provisions in a way that we cannot." *EEOC v. Arabian American Oil Co.*, 59 U.S.L.W. 4225 (U.S. Mar. 26, 1991).

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS' ASS'N, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

RONALD CHISOM, ET AL.,

v. *Petitioners,*

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA

v. *Petitioner,*

CHARLES E. ROEMER, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

I. Whether vote dilution challenges to state judicial elections are so different from traditional vote dilution cases that one cannot reasonably conclude that Congress intended to make judgeships subject to the 1982 amendment.

II. Whether vote dilution remedies are inherently inappropriate for state trial court judges.

III. Whether vote dilution remedies are inappropriate for state court judges because they would undercut the independence of the judiciary and violate the principle of separation of powers.

IV. Whether other possible vote dilution remedies are equally inapplicable and inappropriate in the case of judges.

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE STATE OF GEORGIA

The consolidated appeals in this case involve questions concerning the application of vote dilution principles of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, to state judicial elections. Claims of the same sort that are presented in these cases have been asserted against agencies and officers of the State of Georgia. See *Tyrone Brooks, et al. v. State Board of Elections, et al.*, Case No. CV288-146 (S.D. Ga., filed July 13, 1988). The plaintiffs there claim that the existing circuits for electing judges of the State's superior courts, which are the trial courts of general legal, equitable and felony jurisdiction, should be subjected to liability and remedies under Section 2. Specifically, the plaintiffs there claim that the existing circuits should be subdistricted into single member districts; that the State's majority vote requirement should be eliminated; and that incumbent judges should be compelled to run against one another, rather than for separate designated seats.

The outcome of the appeals in the instant case will be of great significance to the resolution of the similar claims pending in the United States District Court for the Southern District of Georgia. Moreover, the outcome of this case would affect whether similar claims might be asserted against other trial courts in the State of Georgia, and whether such claims might also be asserted against the Georgia Court of Appeals and the Georgia Supreme Court.

The State of Georgia thus has the utmost interest in the outcome of the present appeals. Amicus is of the firm belief that the Fifth Circuit Court of Appeals' rulings here

were correct, that they should be affirmed, and that Section 2 of the Voting Rights Act should not be extended to apply vote dilution theories to state judgeships.

The State of Georgia as amicus believes that a thorough statutory analysis and review of the legislative history behind the 1982 amendment to the Voting Rights Act, has been properly made by the Fifth Circuit and by other briefs filed with this Court in support of affirmance. While the State of Georgia agrees with those arguments, they will not be reiterated here. Rather, the State of Georgia wishes to bring to the Court's attention several other matters that amicus believes weigh against the extension of vote dilution principles to state court judgeships, and particularly trial court judgeships.

SUMMARY OF ARGUMENT

It is undisputed that the testimony before Congress concerning the need to amend Section 2 to create a cause of action for vote dilution related *exclusively* to traditional legislative type representative bodies – state legislatures, county commissions, city councils, and the like. Not a single witness before either the House or the Senate Committees that considered the amendment ever suggested that vote dilution principles should be applied to judges *or* that there was any need for such a drastic federal remedy in the case of judgeships.

As the Supreme Court determines whether, in its judgment, Congress intended to apply vote dilution principles to judgeships, the State of Georgia believes that the fact that the matter was never brought to Congress' attention is strong evidence that weighs against a finding that

the new vote dilution principles should apply to this area. Of equal importance, amicus believes that there are such fundamental differences, as a matter of practicality and as a matter of fact, between traditional representative bodies and judicial elections that it is not reasonable to assume that Congress would have applied vote dilution principles to judgeships if Congress had actually considered the question.

While Congress was presented with testimony in 1981 and 1982 that the underrepresentation of minorities on local elected bodies was directly caused by election systems that exclude minorities *because of their race*, the exact opposite is the case in judicial elections around this nation. While it is true that minorities generally are not present on the state court bench – or on the federal bench for that matter – in proportion to their numbers in the general population, the reason for that is not electoral discrimination. Rather, the reason is the relatively lower percentage of minorities who are licensed to practice law and who, as such, are legally qualified to serve as judges. In the State of Georgia, for example, minority candidates have been very successful in seeking election and nomination to judgeships insofar as they have tried to do so. Indeed, the percentage of blacks on the bench actually exceeds their percentage within the Bar. Although it is true that the percentage of blacks on the bench is less than their overall percentage in the population at large, the sole reason for that disparity is their relatively lower numbers in the Bar.

Since the "underrepresentation" of minority judges that the plaintiffs complain about is not the product of the kind of electoral discrimination that was the basis of Congress' action in adopting the vote dilution statute in

1982, one cannot reasonably assume that Congress would have concluded that it was necessary to impose vote dilution principles on state judiciaries. Doing so would have been a radical intrusion into traditionally state prerogatives.

In addition, as a matter of both theory and practice, vote dilution remedies are inherently contradictory to the functions of the judiciary. The function of a judge is not to "represent" persons by bringing constituents' views to the bench. To the contrary, judges are supposed to apply the law neutrally to the evidence brought before them. While subdistricting remedies allow the voice of minority communities to be manifested more aggressively in the collegial decision making of representative bodies, subdistricting would provide no such benefits to minority voters electing trial court judges. Since trial court judges act individually and each is vested with the full authority of the court, the voters of a subdistrict who might appear in a case before a particular judge would be entirely disfranchised – rather than having some new kind of fuller and more equal "political access" – whenever they appeared before a judge who happened to have been elected from a subdistrict in which the parties did not reside.

Subdistricting judges would have a variety of other undesirable consequences, not the least of which would be the impairment of judicial independence. With judges being subject to frequent reapportionment, incumbent judges would be thrown into the political thicket of redistricting. Redistricting would be performed by state legislatures under the Constitutions of most States, including that of Georgia. Drawing the judiciary into the thicket of their own reapportionment would force state judges into

a level of subservience to state legislators and other political figures that would severely impugn the judiciary's present ability to remain impartial and to render decisions based on the facts and the law presented, rather than on the parties and politics involved.

Other vote dilution principles that might apply to other offices, such as attacks on majority voting or the separation of elections into separate posts for each elected official, are equally inappropriate and inapplicable to judgeships. The State of Georgia may be unique in having had extensive experience with both majority and plurality voting – before 1964 the political parties were allowed to chose their own rule in that regard – and the experience with plurality voting was uniformly negative. The use of separate designated seats for electing judges is particularly important to avoid having incumbent judges running against one another. Requiring incumbent judges to run against one another for open seats would create pressure for those judges to make their records, whether on criminal sentencing or other matters, more prominent and "attention-catching" than that of other judges. Again, the objective of judicial impartiality would be undercut.

ARGUMENT

I. VOTE DILUTION CHALLENGES TO STATE JUDICIAL ELECTIONS ARE SO DIFFERENT FROM TRADITIONAL VOTE DILUTION CASES INVOLVING LEGISLATIVE BODIES THAT ONE CANNOT REASONABLY CONCLUDE THAT CONGRESS INTENDED TO MAKE JUDGESHIPS SUBJECT TO THE 1982 AMENDMENT.

Based on an extensive review of the language of the Act and its legislative history, the Fifth Circuit's en banc

decision in these cases concluded that vote dilution claims cannot be brought against judges under the amended Section 2 of the Voting Rights Act. The State of Georgia as amicus curiae agrees entirely with the reasoning of the Court of Appeals and with the arguments made by appellees and other amici in support of affirmance of the Court of Appeals' rulings. See also, C. Cole, *The Voting Rights Act and the Election of Judges*, 14 AM. J. TRIAL ADVOCACY 1, 44-58 (1990). Georgia will not reiterate any of those arguments here, but wishes instead to point out some additional factors that support the conclusion reached by the Court of Appeals.

All parties to these cases agree with one point – applying vote dilution principles to state judgeships would significantly intrude into an area of public policy that traditionally has been the prerogative of the States. That being the case, Congress will not be found to have usurped the States' traditional authority unless the amended Section 2 clearly and expressly states that intent. Before Congress may be deemed to have altered the "usual constitutional balance between the State and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Will v. Michigan Department of State Police*, 491 U.S. 58, ___, 109 S.Ct. 2304, 2308 (1989). "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 109 S.Ct. at 2308-09.

The reasoning of the Court of Appeals and the arguments advanced by appellees make it apparent that the

"clear statement" of congressional intent that would be required to impose vote dilution theories on state judiciaries is lacking. But there is another critical factor which also weighs heavily against finding that Section 2 vote dilution theories apply here. That fact, simply put, is that the circumstances surrounding state judicial elections are so different from those that pertain to traditional vote dilution challenges to legislative bodies, that it would be unreasonable to assume that Congress would have made vote dilution principles applicable to judgeships if Congress had faced the question. To the contrary, it is far more likely that, if Congress had made any inquiry into this topic, it would have concluded the exact opposite, that vote dilution principles were both inappropriate and unnecessary in the area of judicial elections.

In enacting the vote dilution provision of the amended Section 2, Congress was concerned with the ability of minority groups to have an opportunity to elect representatives of their choice and to participate meaningfully in the political process. Testimony was given to Congress that at-large elections in some communities foreclosed minorities from having a meaningful role in the political process, and that minority candidates could not be elected because of their race.

The situation is entirely different, as a matter of fact, with the judiciary. To the extent that there is a disparity between the number of minority judges and the percentage of minorities in the general population, that difference arises because the percentage of persons qualified to serve as judges who are minority is much less than the minority percentage in the general population.

In the State of Georgia, for example, the Georgia Constitution requires that superior court judges be members of the Bar for seven years or more. Ga. Const., Art. VI, Sec. VII, Par. II(a). This requirement is typical of what is found in other States. No one has previously alleged that that requirement is somehow arbitrary, racially discriminatory, or illegal, yet it is that requirement alone – and not circuit-wide elections or majority vote requirements – that has determined the relative number of black and white superior court judges sitting at present.

In the State of Georgia, six of 135 incumbent superior court judges are black, or 4.4 percent. This number *exceeds* the percentage of black lawyers in the State of Georgia, which is three percent, and it substantially exceeds the percentage of lawyers who are black *and* who satisfy the minimum seven-year practice requirement.

Furthermore, black candidates who have run for judgeships in Georgia have been very successful. Starting with the most comprehensive elections, there have been three instances where black candidates have run for statewide appellate courts, one for a seat on the Georgia Supreme Court and two for seats on the Georgia Court of Appeals. *The black candidates defeated white opponents in each of these three state-wide elections.* There have been ten other judicial elections since 1970 in which black and white candidates have opposed one another for the State's major trial courts, and a black candidate won seven of those ten races.[1] In 15 additional elections, black

[1] In another of those ten races, the black candidate was unsuccessful, but neither did he carry a majority of the black voters.

candidates for these trial court judgeships have been elected without opposition.

The majority of all present incumbent superior court judges in Georgia were initially appointed to their positions. These appointments arose either through an initial appointment to a newly created seat or through the appointment of a new judge to an existing position that became vacant in mid-term. Appointments to superior court vacancies have been made by the Governor upon the recommendation of the Judicial Nominating Commission. As a matter of fact, black lawyers who have sought such appointments to superior court positions have enjoyed a success rate substantially higher than that of white applicants.

While the specific facts concerning the election and appointment history of minorities in the other 49 states naturally vary, the pattern exhibited in the State of Georgia is not uncommon in other States. Most significantly, the key question concerning minority "underrepresentation" on the bench in all States is the same. The issue does not relate principally to electoral problems, but to the fact that minority members of the Bar who are available to serve as judges are significantly fewer than the percentages of minorities in the general population.

This key issue that dominates the question of minority representation among judges is closely akin to the "qualified pool" type of issue that is part of this Court's decisions in employment discrimination and other areas. See, e.g., *Ward Cove Packing, Inc. v. Antonio,* 490 U.S. 642 (1989). It is an issue that has nothing whatsoever to do

with the vote dilution questions that were faced by Congress when it enacted the amended Section 2 of the Voting Rights Act in 1982.

The "qualified pools" of candidates for typical representative offices (legislatures, city councils, etc.) in the United States consist of all of those who have the legal qualifications to hold those offices, which generally are citizenship, residency, and some age requirement. Since the qualified pools of minority candidates for those offices, percentage-wise, are essentially the same as the percentage of minorities in the general population, Congress never had to consider this question in enacting the vote dilution principle in 1982. Neither did a single witness before Congress ever address this question in 1981 or 1982.

Had Congress addressed these questions, and had Congress considered the evidence and issues as they relate to the judiciary, it is not reasonable to assume that Congress would have concluded that the same federal legislative relief was necessary for the judiciary as for legislative offices. The basic facts and circumstances are simply too different.

II. VOTE DILUTION REMEDIES ARE INHERENTLY INAPPROPRIATE AND DEVOID OF RATIONAL JUSTIFICATION FOR STATE TRIAL JUDGES.

The remedial theory conceived of in the vote dilution decisions of this Court and the lower federal courts, is the replacement of multi-member districts and at-large elections with single member districts. See, e.g., *Thornburg v.*

Gingles, 478 U.S. 30 (1986). The purpose of that remedy is to allow minority voters who are concentrated in a particular area to elect representatives of their choice. Those minority-chosen officials then carry the views of their constituencies to the public body to which they have been elected, they advocate those views during the collegial decision making of those bodies, and the ultimate public policy decisions of those bodies presumably reflect the input of the minority-chosen candidates. Minority voters benefit from this remedy in that all of the actions of the body are presumably more reflective of and responsive to the concerns and views of the minority community.

The logic of this remedy, however, is wholly inapplicable in the case of trial court judges. State trial court judges do not act collegially as do persons elected to representative bodies, such as state legislatures, city councils, school boards, and other policy setting bodies with general legislative authority. Instead, the entire power and authority of the trial court is vested in each and every trial judge, and when judges preside over cases, they exercise all of that authority without any limitations imposed by any of the other persons who were elected as judges of that court.

As a practical matter, therefore, a minority voter would derive none of the benefits from a subdistricted trial court that he or she would derive from a subdistricted city council or other representative body. Where a minority constituent is a party before a court, the chances are that they would more likely appear, if the court were subdistricted, before a judge that that constituent had no opportunity at all to vote on. Thus, as a practical matter, if subdistricting remedies were applied

to the judiciary, minority voters would not in any way achieve some new or enhanced "equal opportunity to participate in the political process," 42 U.S.C. §1973. More often than not, the voters would instead be entirely disfranchised in connection with those actions of the local courts that might directly and personally impact on them.

This situation is entirely different from traditional cases involving representative government where minority citizens' votes are manifested in the electoral body through their elected representative. Those representatives, in turn, cast their votes on *every single* action of the legislative body. Those bodies cannot act in any other way, except through that collegial process that involves the equal actions of each of the elected representatives. That cannot occur with elected trial court judges because the functions of a court and representative bodies are so different, and judges act without any of the collegial constraints that characterize representative bodies.

III. VOTE DILUTION REMEDIES ARE PARTICULARLY INAPPROPRIATE FOR STATE COURT JUDGES BECAUSE THEY WOULD SEVERELY UNDERCUT THE INDEPENDENCE OF THE JUDICIARY AND THE SEPARATION OF POWERS PRINCIPLES THAT ARE FOUND IN THE CONSTITUTIONS OF ALL 50 STATES.

Separation of the powers of the three branches of government is fundamental to the American concept of government, both on the federal and state level. Each of the 50 state Constitutions incorporates notions of this sort, just as does the federal Constitution. See *Marbury v. Madison*, 5 U.S. 137 (1803). As a practical matter, however,

vote dilution remedies would severely undercut the independence of state judiciaries and, in turn, undermine the principle of separation of powers.

If vote dilution notions were imposed on state judiciaries and traditional subdistricting remedies arose, the political independence now enjoyed by state judiciaries would be destroyed. With judges elected from electoral subdistricts, reapportionment would be required for those subdistricts on a continuous basis. Not only would reapportionment be required with each decennial census, reapportionment would also be required on those intervening occasions when new judges were added to a court on account of increased caseloads. The court's subdistricts would have to be adjusted to reflect each new judgeship. In the metropolitan areas, for example, where judgeships are typically added each year or so, reapportionment would literally be an annual affair.[2]

As a practical matter, reapportionment of judicial subdistricts would be the function of the state legislature

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[2] While the Fourteenth Amendment does not appear to require equalization of the number of judges from circuit to circuit based on population, because the number of judges has historically been based on caseload, *New York Trial Lawyers v. Rockefeller*, 267 F.Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F.Supp 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), that situation is entirely different from what would pertain with subdistrict remedies for vote dilution. With electoral subdistricts for a single court, judgeships on that court would no longer be apportioned on the basis of caseload, but rather on the basis of the population of voters within the court's circuit. If Section 2 were so construed to make judges "representatives," it would appear that one person/one vote principles would apply. Hence, decennial and more frequent apportionment would be required.

under the Constitutions of most States, and that would be the case in Georgia. With incumbent judges' districts subject to constant redrawing and political intermeddling by legislators, the independence of the judiciary would inevitably suffer. Our ideal in this country is for judges to make decisions based on their good faith perception of the law and the facts, not on the basis of the political implications and repercussions of their decisions, and not on the basis of how any one or more well-placed individuals might react to their decisions. But it is not realistic to think that a judge could wholly ignore the grave implications of his or her own reapportionment in cases where local legislators might have some interest in the outcome of a case. Since an incumbent judge's continuation in office and very livelihood would be controlled by how districts were drawn and redrawn, the threat to a judge of a punitive reapportionment would be very real. Only a rare person could completely ignore that threat.

Moreover, the interference caused by the political thicket of reapportionment would unfortunately arise frequently in a judge's normal caseload. Members of the legislature would have an interest in a wide variety of cases that routinely come before a State's trial courts. All issues dealing with the State, for example, including the constitutionality of State laws, actions to review administrative decisions, prominent criminal cases and capital cases, and a virtually endless variety of other publicly important cases would potentially demand the attention of one or more legislators. Legislators who might have a personal interest in a case, either as a party, an attorney representing a party, or simply the friend of a party or witness, would create another class of cases where a

judge's independence could be impugned, however subtly, by the fear of irritating a legislator who had reapportionment power over that judge.

These grave problems do not exist with the single-member district remedies imposed in vote dilution cases involving representative bodies. To the contrary, the political give and take of reapportionment is an accepted and proper part of the overall political process involving those bodies. But it would be antithetical to our concept of an independent, fair-minded judiciary acting impartially based on the law and the facts before the court.

IV. POSSIBLE VOTE DILUTION REMEDIES OTHER THAN SUBDISTRICTING ARE EQUALLY INAPPLICABLE AND INAPPROPRIATE IN THE CASE OF JUDGES.

While the State of Georgia understands that the issues before this court are the strict application of Section 2 to judges, and the impropriety of applying subdistricting remedies to judges, amicus would also point out that other remedies that have been considered in voting cases are equally inappropriate. One such remedy, the replacement of majority vote requirements with plurality requirements, has been sought in several recent cases by private litigants and by the Department of Justice. See, e.g., *Brooks, et al. v. Harris, et al.*, Case No. 1:90-CV1001-RCF (N.D. Ga., filed May 8, 1990); *United States of America v. State of Georgia, et al.*, Case No. 1:90-CV-1749-RCF (N.D. Ga., filed August 9, 1990). As a practical matter, however, majority vote requirements, while having little if any adverse impact on minority voters, serve compelling public interests.

It may be that the State of Georgia has unique experience in that regard because, prior to the adoption of a new and comprehensive Election Code in 1964, political parties had the option of using plurality voting or majority voting in their primary elections. Both practices were thus present in various counties throughout the State over the years prior to 1964, at the option of the local political party executive committees. As a practical matter, when the State of Georgia determined that a comprehensive Election Code should be adopted and that this authority should be taken away from the political parties, the evidence was overwhelming that plurality voting had been nothing short of disastrous from the public's point of view. Plurality voting frequently led to the perpetuation in office of unfit or outright corrupt public officials who, although opposed by a majority of the citizenry, could not be removed from office because of the plurality vote principle. Because of the ability of an incumbent, even a corrupt one, to garner a significant number of votes – whether 25 or 35 percent – incumbents proved unbeatable. They simply saw that enough other candidates qualified from different areas around the jurisdiction to successfully split opposition votes. It was not at all unusual in those cases for the incumbents and their associates to pay the qualifying fees for these other candidates. Time after time, public spirited citizens failed in their efforts to remove such people from office, even though the total votes cast by opposition forces constituted a majority of the total votes cast.

The sole argument ever advanced in favor of plurality voting when the issue was debated in 1963 and

1964 in connection with the adoption of the State's comprehensive new Election Code, was that plurality voting was cheaper. A second, runoff election, when required, naturally caused some additional expense. That argument paled by comparison to the public interest in ensuring that the will of the majority was followed and that, in particular, undesirable officials could not be perpetuated in office by plurality voting.

Those courts that have considered challenges to majority voting to date have evidenced clear hostility to the plaintiffs' claims, and for good reason. See, e.g., *Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Whitfield v. Democratic Party of Arkansas*, 686 F.Supp. 1365 (E.D. Ark. 1988), aff'd by an equally divided court, 902 F.2d 15 (8th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1089 (1991). The efforts of various segments of the civil rights community to advance plurality voting under the guise of vote dilution principles is seriously misplaced and is very much contrary to the interests of the public at large, both majority and minority.

The use of separate designated seats (often called "numbered posts") to elect judgeships in Georgia is another practice that has been attacked, on occasion, under the guise of vote dilution principles. This practice is, as a practical matter, necessary to effectuate majority vote principles. In addition, it serves important and salutary purposes in connection with the election of judges.

The use of separate posts for electing each judge of a court ensures that that judge is not put in direct competition before the voters with other members of the court. If

posts were eliminated and judges were thrown into direct competition with one another, that would create highly inappropriate pressure on sitting judges to render rulings that would maximize their public exposure. Judges might feel pressure to impose as great as possible a sentence in criminal cases, for example, so that their sentencing record might not be unfavorably compared to other incumbent judges against whom they would be running.

The maintenance of impartial and independent judges, unaffected by immediate political concerns, is an important consideration that supports using separate designated posts for election of judgeships. Vote dilution principles contained in the new Section 2 of the Voting Rights Act should not be interpreted to undermine these practices.

CONCLUSION

For the foregoing reasons, the reasons advanced by respondents and other amici in their support, and for the reasons stated by the Fifth Circuit Court of Appeals, the State of Georgia respectfully requests that this Court affirm the decisions below.

Respectfully submitted,

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